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JANUARY - DECEMBER 1987

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UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior -- Donald P. Hodel

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INDEX-DIGEST

JANUARY - DECEMBER 1987

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Editor: Rachael Cubbage

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M -- Solicitor's Opinion
OHA -- Office of Hearings and Appeals
OSMRE -- Office of Surface Mining Reclamation and Enforcement
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188(a) -----	98 IBLA 363 (July 31, 1987)	
188(b) -----	96 IBLA 352 (Apr. 8, 1987)	
	96 IBLA 398 (Apr. 14, 1987)	
	98 IBLA 293 (July 20, 1987)	
	98 IBLA 363 (July 31, 1987)	
	99 IBLA 1 (Aug. 11, 1987)	
	99 IBLA 5 (Aug. 11, 1987)	
	100 IBLA 313 (Dec. 28, 1987)	
188(c) -----	96 IBLA 398 (Apr. 14, 1987)	
	98 IBLA 293 (July 20, 1987)	
	99 IBLA 1 (Aug. 11, 1987)	
188(d) -----	96 IBLA 398 (Apr. 14, 1987)	
	98 IBLA 293 (July 20, 1987)	
	99 IBLA 1 (Aug. 11, 1987)	
	99 IBLA 5 (Aug. 11, 1987)	
	100 IBLA 313 (Dec. 28, 1987)	
188(e) -----	99 IBLA 1 (Aug. 11, 1987)	
	99 IBLA 5 (Aug. 11, 1987)	
	100 IBLA 313 (Dec. 28, 1987)	
188(i)(2) --	100 IBLA 313 (Dec. 28, 1987)	
189 --------	100 IBLA 139 (Dec. 2, 1987)	
201 --------	98 IBLA 325 (July 31, 1987)	
	99 IBLA 179 (Oct. 9, 1987)	
201-209 ----	95 IBLA 239 (Jan. 16, 1987)	
	96 IBLA 280 (Mar. 26, 1987)	
	97 IBLA 241 (May 13, 1987)	
	98 IBLA 198 (June 29, 1987)	
	99 IBLA 342 (Nov. 3, 1987)	
201(a)(1) --	96 IBLA 126 (Mar. 11, 1987)	
201(a) (2)(A) --	96 IBLA 126 (Mar. 11, 1987)	
207 --------	96 IBLA 280 (Mar. 26, 1987)	
	97 IBLA 241 (May 13, 1987)	
	98 IBLA 114 (June 16, 1987)	
	99 IBLA 179 (Oct. 9, 1987)	
	99 IBLA 342 (Nov. 3, 1987)	
207(a) -----	96 IBLA 140 (Mar. 11, 1987)	
	96 IBLA 280 (Mar. 26, 1987)	
	97 IBLA 241 (May 13, 1987)	
	98 IBLA 114 (June 16, 1987)	
	98 IBLA 198 (June 29, 1987)	
	99 IBLA 342 (Nov. 3, 1987)	
207(b) -----	98 IBLA 198 (June 29, 1987)	
209 --------	96 IBLA 140 (Mar. 11, 1987)	
	99 IBLA 5 (Aug. 11, 1987)	
	100 IBLA 313 (Dec. 28, 1987)	
223-236b ---	95 IBLA 239 (Jan. 16, 1987)	
226 --------	95 IBLA 267 (Jan. 27, 1987)	
	96 IBLA 61 (Feb. 27, 1987)	
	96 IBLA 87 (Mar. 9, 1987)	
	96 IBLA 178 (Mar. 18, 1987)	
	97 IBLA 96 (Apr. 29, 1987)	
	97 IBLA 171 (May 7, 1987)	
	98 IBLA 363 (July 31, 1987)	
	99 IBLA 5 (Aug. 11, 1987)	
	99 IBLA 40 (Sept. 8, 1987)	
	99 IBLA 128 (Sept. 22, 1987)	
	100 IBLA 37 (Nov. 19, 1987)	
226(a) -----	95 IBLA 239 (Jan. 16, 1987)	

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226(b) -----	95 IBLA 337 (Jan. 30, 1987)	
	96 IBLA 316 (Apr. 2, 1987)	
	97 IBLA 322 (May 20, 1987)	
	98 IBLA 96 (June 12, 1987)	
	98 IBLA 118 (June 17, 1987)	
	98 IBLA 193 (June 29, 1987)	
	98 IBLA 213 (July 1, 1987)	
	98 IBLA 268 (July 10, 1987)	
	99 IBLA 29 (Aug. 26, 1987)	
	99 IBLA 184 (Oct. 13, 1987)	
	99 IBLA 194 (Oct. 13, 1987)	
	99 IBLA 369 (Nov. 4, 1987)	
	100 IBLA 139 (Dec. 2, 1987)	
	100 IBLA 172 (Dec. 8, 1987)	
	100 IBLA 313 (Dec. 28, 1987)	
226(b)(1) --	95 IBLA 247 (Jan. 23, 1987)	
	97 IBLA 85 (Apr. 28, 1987)	
	98 IBLA 283 (July 20, 1987)	
226(c) -----	95 IBLA 140 (Jan. 12, 1987)	
	95 IBLA 221 (Jan. 15, 1987)	
	95 IBLA 239 (Jan. 16, 1987)	
	96 IBLA 1 (Feb. 25, 1987)	
	96 IBLA 286 (Mar. 30, 1987)	
	97 IBLA 74 (Apr. 28, 1987)	
	99 IBLA 194 (Oct. 13, 1987)	
	99 IBLA 301 (Oct. 27, 1987)	
	99 IBLA 307 (Oct. 27, 1987)	
226(e) -----	98 IBLA 143 (June 22, 1987)	
	99 IBLA 5 (Aug. 11, 1987)	
	99 IBLA 53, 94 I.D. 394 (1987)	
	99 IBLA 164 (Oct. 2, 1987)	
	99 IBLA 245 (Oct. 20, 1987)	
	100 IBLA 37 (Nov. 19, 1987)	
	100 IBLA 313 (Dec. 28, 1987)	
226(f) -----	96 IBLA 80 (Mar. 2, 1987)	
	99 IBLA 164 (Oct. 2, 1987)	
226(j) -----	96 IBLA 320, 94 I.D. 129 (1987)	
	96 IBLA 352 (Apr. 8, 1987)	
	97 IBLA 96 (Apr. 29, 1987)	
	97 IBLA 102 (Apr. 29, 1987)	
	97 IBLA 171 (May 7, 1987)	
	99 IBLA 53, 94 I.D. 394 (1987)	
	99 IBLA 245 (Oct. 20, 1987)	
351 --------	95 IBLA 239 (Jan. 16, 1987)	
351-359 ----	95 IBLA 239 (Jan. 16, 1987)	
	96 IBLA 1 (Feb. 25, 1987)	
	99 IBLA 5 (Aug. 11, 1987)	
352 --------	95 IBLA 140 (Jan. 12, 1987)	
	95 IBLA 144, 94 I.D. 1 (1987)	
	95 IBLA 247 (Jan. 23, 1987)	
	95 IBLA 267 (Jan. 27, 1987)	
	97 IBLA 66 (Apr. 28, 1987)	
	99 IBLA 29 (Aug. 26, 1987)	
	99 IBLA 40 (Sept. 8, 1987)	
	100 IBLA 139 (Dec. 2, 1987)	
352-359 ----	99 IBLA 40 (Sept. 8, 1987)	
601 --------	95 IBLA 107 (Jan. 6, 1987)	
	95 IBLA 144, 94 I.D. 1 (1987)	
	98 IBLA 325 (July 31, 1987)	
	100 IBLA 7 (Nov. 13, 1987)	
	100 IBLA 185, 94 I.D. 453 (1987)	
	100 IBLA 322 (Dec. 31, 1987)	
601-604 ----	95 IBLA 107 (Jan. 6, 1987)	
	100 IBLA 261 (Dec. 9, 1987)	
	100 IBLA 322 (Dec. 31, 1987)	

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sec. 602 ——— 95 IBLA 144, 94 I.D. 1 (1987)
100 IBLA 7 (Nov. 13, 1987)
602(a) ——— 95 IBLA 144, 94 I.D. 1 (1987)
611 ——— 95 IBLA 271 (Jan. 29, 1987)
100 IBLA 7 (Nov. 13, 1987)
100 IBLA 185, 94 I.D. 453 (1987)
100 IBLA 322 (Dec. 31, 1987)
701 ——— 98 IBLA 157 (June 24, 1987)
1001 et seq. ——— 100 IBLA 282 (Dec. 16, 1987)
1003 ——— 98 IBLA 321 (July 30, 1987)
1004(a) ——— 100 IBLA 282 (Dec. 16, 1987)
1023 ——— 100 IBLA 282 (Dec. 16, 1987)
1201 ——— 99 IBLA 242 (Oct. 20, 1987)
99 IBLA 257 (Oct. 20, 1987)
1201-1328 —— 95 IBLA 360 (Feb. 18, 1987)
97 IBLA 285, 94 I.D. 181 (1987)
99 IBLA 274 (Oct. 20, 1987)
99 IBLA 349 (Nov. 3, 1987)
1201 et seq. ——— 98 IBLA 56 (June 8, 1987)
1202 ——— 97 IBLA 314 (May 19, 1987)
1202(b) ——— 98 IBLA 325 (July 31, 1987)
1232 ——— 97 IBLA 18 (Apr. 22, 1987)
1252 ——— 96 IBLA 52 (Feb. 27, 1987)
96 IBLA 338 (Apr. 7, 1987)
1252(a) ——— 96 IBLA 338 (Apr. 7, 1987)
1252(b) ——— 96 IBLA 52 (Feb. 27, 1987)
97 IBLA 285, 94 I.D. 181 (1987)
1252(c) ——— 97 IBLA 285, 94 I.D. 181 (1987)
1253 ——— 97 IBLA 285, 94 I.D. 181 (1987)
99 IBLA 87 (Sept. 15, 1987)
1254(a) ——— 97 IBLA 314 (May 19, 1987)
1257(g) ——— 99 IBLA 285 (Oct. 23, 1987)
1259(b) ——— 95 IBLA 182 (Jan. 13, 1987)
1260(a) ——— 97 IBLA 314 (May 19, 1987)
1260(b) ——— 97 IBLA 314 (May 19, 1987)
1260(c) ——— 99 IBLA 274 (Oct. 20, 1987)
1263 ——— 97 IBLA 314 (May 19, 1987)
1264 ——— 97 IBLA 314 (May 19, 1987)
1265 ——— 95 IBLA 182 (Jan. 13, 1987)
95 IBLA 360 (Feb. 18, 1987)
99 IBLA 257 (Oct. 20, 1987)
1265(b)(3) — 96 IBLA 97 (Mar. 9, 1987)
97 IBLA 285, 94 I.D. 181 (1987)
1265(b)(10)(B)(ii) —— 95 IBLA 360 (Feb. 18, 1987)
98 IBLA 26 (June 2, 1987)
1265(b)(15) - 99 IBLA 285 (Oct. 23, 1987)
1265(b)(15)(C) —— 99 IBLA 285 (Oct. 23, 1987)
1265(b)(19) - 95 IBLA 182 (Jan. 13, 1987)
1267(h) ——— 96 IBLA 216, 94 I.D. 89 (1987)
1267(h)(1) — 96 IBLA 216, 94 I.D. 89 (1987)
1268(a) ——— 97 IBLA 285, 94 I.D. 181 (1987)
98 IBLA 171 (June 24, 1987)
99 IBLA 274 (Oct. 20, 1987)
1268(c) ——— Secy Order, 94 I.D. 349 (1987)
1268(f) ——— 97 IBLA 285, 94 I.D. 181 (1987)
1268(h) ——— 97 IBLA 285, 94 I.D. 181 (1987)
98 IBLA 171 (June 24, 1987)
Secy Order, 94 I.D. 349 (1987)
1271 ——— 95 IBLA 182 (Jan. 13, 1987)
96 IBLA 338 (Apr. 7, 1987)
99 IBLA 285 (Oct. 23, 1987)
100 IBLA 300 (Dec. 23, 1987)

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sec. 1271(a) ——— 95 IBLA 182 (Jan. 13, 1987)
98 IBLA 26 (June 2, 1987)
100 IBLA 300 (Dec. 23, 1987)
1271(a)(1) — 95 IBLA 182 (Jan. 13, 1987)
95 IBLA 204, 94 I.D. 12 (1987)
96 IBLA 52 (Feb. 27, 1987)
96 IBLA 333 (Apr. 7, 1987)
96 IBLA 216, 94 I.D. 89 (1987)
97 IBLA 285, 94 I.D. 181 (1987)
98 IBLA 26 (June 2, 1987)
99 IBLA 87 (Sept. 15, 1987)
100 IBLA 300 (Dec. 23, 1987)
1271(a)(2) -- 96 IBLA 216, 94 I.D. 89 (1987)
99 IBLA 285 (Oct. 23, 1987)
1271(a)(3) -- 96 IBLA 266 (Mar. 26, 1987)
96 IBLA 338 (Apr. 7, 1987)
97 IBLA 18 (Apr. 22, 1987)
97 IBLA 285, 94 I.D. 181 (1987)
98 IBLA 26 (June 2, 1987)
98 IBLA 171 (June 24, 1987)
99 IBLA 285 (Oct. 23, 1987)
1271(a)(5) — 98 IBLA 26 (June 2, 1987)
1271(b) ——— 98 IBLA 395 (Aug. 6, 1987)
99 IBLA 285 (Oct. 23, 1987)
99 IBLA 349 (Nov. 3, 1987)
1272(a)(2) — 97 IBLA 314 (May 19, 1987)
1272(a)(3) — 97 IBLA 314 (May 19, 1987)
1272(a)(6) — 98 IBLA 306 (July 30, 1987)
1272(b) ——— 97 IBLA 314 (May 19, 1987)
1272(c) ——— 96 IBLA 126 (Mar. 11, 1987)
97 IBLA 314 (May 19, 1987)
1272(e) ——— 97 IBLA 314 (May 19, 1987)
1272(e)(4) -- 96 IBLA 126 (Mar. 11, 1987)
1275 ——— 96 IBLA 266 (Mar. 26, 1987)
98 IBLA 171 (June 24, 1987)
98 IBLA 395 (Aug. 6, 1987)
100 IBLA 300 (Dec. 23, 1987)
1275(a) ——— 97 IBLA 78 (Apr. 28, 1987)
1275(a)(1) -- 98 IBLA 26 (June 2, 1987)
1276(a)(1) — 95 IBLA 182 (Jan. 13, 1987)
100 IBLA 300 (Dec. 23, 1987)
1278 ——— 97 IBLA 78 (Apr. 28, 1987)
1291(2) ——— 96 IBLA 97 (Mar. 9, 1987)
1291(8) ——— 96 IBLA 216, 94 I.D. 89 (1987)
1291(13) ——— 99 IBLA 274 (Oct. 20, 1987)
1304 ——— 98 IBLA 325 (July 31, 1987)
1305 ——— 98 IBLA 325 (July 31, 1987)
1337(a) ——— 98 IBLA 218, 94 I.D. 329 (1987)
1701 ——— 97 IBLA 387 (May 27, 1987)
1701-1757 ——— 96 IBLA 327 (Apr. 7, 1987)
97 IBLA 387 (May 27, 1987)
1701(b)(3) — 97 IBLA 387 (May 27, 1987)
1719 ——— 97 IBLA 387 (May 27, 1987)
1719(c)(1) — 96 IBLA 149, 94 I.D. 69 (1987)

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1342 ——— 97 IBLA 285, 94 I.D. 181 (1987)

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276a ——— IBCA-1990, 94 I.D. 21 (1987)

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sec. 327 ———— IBCA-1990, 94 I.D. 21 (1987)
351 ———— IBCA-1990, 94 I.D. 21 (1987)
601 ———— IBCA-1834 (May 8, 1987)
IBCA-1953, 94 I.D. 101 (1987)
IBCA-2144 (Nov. 30, 1987)
601-613 —— IBCA-2020 (June 29, 1987)
601 et seq. —— IBCA-1990, 94 I.D. 21 (1987)
605(a) —— IBCA-1990, 94 I.D. 21 (1987)
IBCA-1419-1-81 et al., 94 I.D. 221 (1987)
605(c) —— IBCA-2269, 94 I.D. 211 (1987)
606 ———— IBCA-1419-1-81 et al., 94 I.D. 221 (1987)
IBCA-2360, 94 I.D. 413 (1987)
607 ———— IBCA-2360, 94 I.D. 413 (1987)
610 ———— IBCA-2269, 94 I.D. 211 (1987)
611 ———— IBCA-1838 (June 29, 1987)
IBCA-1419-1-81 et al., 94 I.D. 221 (1987)
IBCA-2269, 94 I.D 211 (1987)

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sec. 4321-4347 —— 99 IBLA 364 (Nov. 3, 1987)
4321-4361 —— 97 IBLA 314 (May 19, 1987)
4332 ———— 96 IBLA 19, 94 I.D. 35 (1987)
96 IBLA 105, 94 I.D. 56 (1987)
98 IBLA 314 (July 30, 1987)
4332(2)(C) — 96 IBLA 19, 94 I.D. 35 (1987)
98 IBLA 108 (June 15, 1987)
4332(2)(E) — 98 IBLA 108 (June 15, 1987)
4601 ———— 7 OHA 47 (Mar. 18, 1987)
4601 et seq. —— 7 OHA 42 (Feb. 2, 1987)
7 OHA 112 (Aug. 19, 1987)
4622 ———— 7 OHA 47 (Mar. 18, 1987)
7 OHA 104 (Aug. 3, 1987)
7 OHA 109 (Aug. 6, 1987)
4622(a) —— 7 OHA 58 (Apr. 13, 1987)
7 OHA 66 (Apr. 22, 1987)
7 OHA 73 (May 5, 1987)
7 OHA 75 (May 7, 1987)
7 OHA 102 (July 20, 1987)
7 OHA 112 (Aug. 19, 1987)
7 OHA 151 (Oct. 29, 1987)
4622(a)(1) — 7 OHA 47 (Mar. 18, 1987)
4622(b) —— 7 OHA 112 (Aug. 19, 1987)
4622(c) —— 7 OHA 151 (Oct. 29, 1987)
4623 ———— 7 OHA 112 (Aug. 19, 1987)
4623(a)(1) — 7 OHA 66 (Apr. 22, 1987)
4623(a)(1)(C) —— 7 OHA 47 (Mar. 18, 1987)
7 OHA 112 (Aug. 19, 1987)
4623(a)(3) — 7 OHA 70 (Apr. 28, 1987)
4624(1) —— 7 OHA 47 (Mar. 18, 1987)
4624(2) —— 7 OHA 47 (Mar. 18, 1987)
4636 ———— 7 OHA 47 (Mar. 18, 1987)
4651(6) —— 7 OHA 66 (Apr. 22, 1987)
4653(1) —— 7 OHA 119 (Sept. 15, 1987)
4653(2) —— 7 OHA 99 (July 1, 1987)

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sec. 31 ———— 100 IBLA 50, 94 I.D. 422 (1987)
98a ———— 96 IBLA 149, 94 I.D. 69 (1987)
141 ———— 98 IBLA 241 (July 6, 1987)

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sec. 141-143 —— 99 IBLA 291 (Oct. 26, 1987)
154 ———— 96 IBLA 379 (Apr. 14, 1987)
98 IBLA 100 (June 12, 1987)
98 IBLA 149 (June 22, 1987)
99 IBLA 297 (Oct. 27, 1987)
161 ———— 95 IBLA 136 (Jan. 12, 1987)
97 IBLA 253 (May 13, 1987)
100 IBLA 44 (Nov. 20, 1987)
185 ———— 96 IBLA 239 (Mar. 24, 1987)
226(g) —— 96 IBLA 249 (Mar. 25, 1987)
270-1 —— 95 IBLA 196 (Jan. 14, 1987)
95 IBLA 261 (Jan. 27, 1987)
96 IBLA 209 (Mar. 19, 1987)
96 IBLA 301 (Apr. 2, 1987)
97 IBLA 350 (May 26, 1987)
270-1-270-3 —— 95 IBLA 261 (Jan. 27, 1987)
96 IBLA 42 (Feb. 27, 1987)
96 IBLA 209 (Mar. 19, 1987)
96 IBLA 301 (Apr. 2, 1987)
97 IBLA 132, 94 I.D. 151 (1987)
97 IBLA 261 (May 13, 1987)
98 IBLA 203 (June 29, 1987)
98 IBLA 241 (July 6, 1987)
100 IBLA 7 (Nov. 13, 1987)
270-3 —— 95 IBLA 196 (Jan. 14, 1987)
96 IBLA 209 (Mar. 19, 1987)
279 ———— 95 IBLA 136 (Jan. 12, 1987)
291 ———— 95 IBLA 144, 94 I.D. 1 (1987)
97 IBLA 63 (Apr. 27, 1987)
98 IBLA 325 (July 31, 1987)
100 IBLA 44 (Nov. 20, 1987)
291-301 —— 95 IBLA 291 (Jan. 29, 1987)
291-302 —— 100 IBLA 7 (Nov. 13, 1987)
299 ———— 95 IBLA 144, 94 I.D. 1 (1987)
97 IBLA 63 (Apr. 27, 1987)
98 IBLA 325 (July 31, 1987)
315 ———— 96 IBLA 4 (Feb. 26, 1987)
97 IBLA 1 (Apr. 16, 1987)
98 IBLA 325 (July 31, 1987)
100 IBLA 70 (Nov. 30, 1987)
315-315m —— 95 IBLA 291 (Jan. 29, 1987)
315-315o-1 - 98 IBLA 258 (July 7, 1987)
315-315r —— 98 IBLA 128 (June 19, 1987)
315-316 —— 100 IBLA 70 (Nov. 30, 1987)
315a ———— 96 IBLA 4 (Feb. 26, 1987)
97 IBLA 1 (Apr. 16, 1987)
315a-315r — 96 IBLA 4 (Feb. 26, 1987)
97 IBLA 1 (Apr. 16, 1987)
315b ———— 99 IBLA 137 (Sept. 25, 1987)
315f ———— 95 IBLA 239 (Jan. 16, 1987)
96 IBLA 256 (Mar. 25, 1987)
98 IBLA 128 (June 19, 1987)
100 IBLA 70 (Nov. 30, 1987)
315g ———— 97 IBLA 340 (May 21, 1987)
100 IBLA 44 (Nov. 20, 1987)
100 IBLA 60 (Nov. 24, 1987)
315g(d) —— 100 IBLA 44 (Nov. 20, 1987)
315h ———— 98 IBLA 4 (May 29, 1987)
98 IBLA 258 (July 7, 1987)
316 ———— 96 IBLA 198 (Mar. 19, 1987)
316m ———— 100 IBLA 267 (Dec. 15, 1987)
321 ———— 96 IBLA 256 (Mar. 25, 1987)
97 IBLA 23 (Apr. 23, 1987)
97 IBLA 105 (Apr. 29, 1987)
97 IBLA 250 (May 13, 1987)

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sec. 321 ---------- 98 IBLA 69 (June 9, 1987)
98 IBLA 128 (June 19, 1987)
326 ---------- 96 IBLA 256 (Mar. 25, 1987)
327 ---------- 98 IBLA 69 (June 9, 1987)
328 ---------- 97 IBLA 250 (May 13, 1987)
351 et seq. ------ 96 IBLA 256 (Mar. 25, 1987)
371-498 ------ 100 IBLA 94, 94 I.D. 429 (1987)
416 ---------- 98 IBLA 251 (July 7, 1987)
99 IBLA 16 (Aug. 14, 1987)
421 ---------- 98 IBLA 251 (July 7, 1987)
661 ---------- 96 IBLA 193 (Mar. 19, 1987)
682(a) ------ 95 IBLA 291 (Jan. 29, 1987)
99 IBLA 174 (Oct. 2, 1987)
687a -------- 98 IBLA 391 (Aug. 5, 1987)
100 IBLA 1 (Nov. 12, 1987)
687a-1 ------ 100 IBLA 1 (Nov. 12, 1987)
751 ---------- 98 IBLA 363 (July 31, 1987)
851 ---------- 98 IBLA 363 (July 31, 1987)
852 ---------- 98 IBLA 363 (July 31, 1987)
869 ---------- 97 IBLA 1 (Apr. 16, 1987)
869-869-4 -- 100 IBLA 60 (Nov. 24, 1987)
869-2 ------- 97 IBLA 1 (Apr. 16, 1987)
870-871 ------ 98 IBLA 358 (July 31, 1987)
871a -------- 98 IBLA 363 (July 31, 1987)
932 --------- 98 IBLA 203 (June 29, 1987)
98 IBLA 237 (July 6, 1987)
98 IBLA 378 (Aug. 4, 1987)
100 IBLA 257 (Dec. 9, 1987)
961 ---------- 98 IBLA 203 (June 29, 1987)
100 IBLA 318 (Dec. 31, 1987)
971a-e ------ 95 IBLA 261 (Jan. 27, 1987)
981-986 ------ 97 IBLA 121 (Apr. 30, 1987)
1068 ---------- 95 IBLA 291 (Jan. 29, 1987)
95 IBLA 343 (Feb. 4, 1987)
95 IBLA 352 (Feb. 11, 1987)
96 IBLA 209 (Mar. 19, 1987)
97 IBLA 108 (Apr. 29, 1987)
97 IBLA 121 (Apr. 30, 1987)
97 IBLA 126 (Apr. 30, 1987)
98 IBLA 153 (June 23, 1987)
99 IBLA 217 (Oct. 15, 1987)
100 IBLA 89 (Nov. 30, 1987)
1068a -------- 97 IBLA 108 (Apr. 29, 1987)
97 IBLA 121 (Apr. 30, 1987)
99 IBLA 217 (Oct. 15, 1987)
100 IBLA 89 (Nov. 30, 1987)
1068b -------- 95 IBLA 343 (Feb. 4, 1987)
97 IBLA 121 (Apr. 30, 1987)
99 IBLA 217 (Oct. 15, 1987)
1165 ---------- 95 IBLA 271 (Jan. 29, 1987)
1171 ---------- 97 IBLA 330 (May 21, 1987)
1181a -------- 98 IBLA 108 (June 15, 1987)
1181a-1181f - 97 IBLA 8 (Apr. 20, 1987)
1272(e)(1) -- 98 IBLA 306 (July 30, 1987)
1301 ---------- 100 IBLA 50, 94 I.D. 422 (1987)
1311-1315 --- 100 IBLA 50, 94 I.D. 422 (1987)
1331-1356 --- 96 IBLA 149, 94 I.D. 69 (1987)
1334(a) ------ 96 IBLA 149, 94 I.D. 69 (1987)
1336 ---------- 96 IBLA 244 (Mar. 24, 1987)
1337 ---------- 96 IBLA 244 (Mar. 24, 1987)
98 IBLA 218, 94 I.D. 329 (1987)
1337(a) ------ 96 IBLA 384 (Apr. 14, 1987)
1337(a)(1)(A) ---- 98 IBLA 218, 94 I.D. 329 (1987)

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sec. 1338 ---------- 96 IBLA 149, 94 I.D. 69 (1987)
1339 ---------- 96 IBLA 149, 94 I.D. 69 (1987)
96 IBLA 384 (Apr. 14, 1987)
1339(a) ------ 96 IBLA 149, 94 I.D. 69 (1987)
1350(c) ------ 96 IBLA 149, 94 I.D. 69 (1987)
1352 ---------- 96 IBLA 244 (Mar. 24, 1987)
1374 ---------- 96 IBLA 149, 94 I.D. 69 (1987)
1571 ---------- 95 IBLA 239 (Jan. 16, 1987)
1571-1599 --- 95 IBLA 239 (Jan. 16, 1987)
98 IBLA 251 (July 7, 1987)
1601 ---------- 96 IBLA 368 (Apr. 10, 1987)
100 IBLA 50, 94 I.D. 422 (1987)
1601-1624 --- 97 IBLA 132, 94 I.D. 151 (1987)
1601-1628 --- 95 IBLA 225 (Jan. 16, 1987)
99 IBLA 201 (Oct. 13, 1987)
1601-1629a -- 15 IBIA 135 (Mar. 20, 1987)
1601(b) ------ 95 IBLA 225 (Jan. 16, 1987)
97 IBLA 367 (May 27, 1987)
1602(e) ------ 95 IBLA 177 (Jan. 13, 1987)
97 IBLA 235 (May 12, 1987)
98 IBLA 177 (June 24, 1987)
100 IBLA 261 (Dec. 9, 1987)
1607 ---------- 98 IBLA 177 (June 24, 1987)
1607(a) ------ 98 IBLA 177 (June 24, 1987)
1610 ---------- 95 IBLA 328 (Jan. 30, 1987)
98 IBLA 177 (June 24, 1987)
99 IBLA 201 (Oct. 13, 1987)
1610(a) ------ 96 IBLA 368 (Apr. 10, 1987)
97 IBLA 235 (May 12, 1987)
97 IBLA 367 (May 27, 1987)
100 IBLA 7 (Nov. 13, 1987)
1610(a)(1)(A) ---- 95 IBLA 225 (Jan. 16, 1987)
1610(b)(1) -- 98 IBLA 177 (June 24, 1987)
1610(b)(2) -- 98 IBLA 177 (June 24, 1987)
1610(b)(2)(B) ---- 98 IBLA 177 (June 24, 1987)
1610(b)(3)(B) ---- 98 IBLA 177 (June 24, 1987)
1611 ---------- 95 IBLA 216 (Jan. 14, 1987)
95 IBLA 328 (Jan. 30, 1987)
96 IBLA 42 (Feb. 27, 1987)
100 IBLA 7 (Nov. 13, 1987)
1611(a) ------ 95 IBLA 177 (Jan. 13, 1987)
98 IBLA 88 (June 10, 1987)
1611(a)(1) -- 95 IBLA 225 (Jan. 16, 1987)
1611(c) ------ 99 IBLA 25 (Aug. 26, 1987)
100 IBLA 261 (Dec. 9, 1987)
1613 ---------- 95 IBLA 328 (Jan. 30, 1987)
96 IBLA 368 (Apr. 10, 1987)
98 IBLA 177 (June 24, 1987)
100 IBLA 7 (Nov. 13, 1987)
1613(a) ------ 97 IBLA 261 (May 13, 1987)
97 IBLA 342 (May 22, 1987)
98 IBLA 88 (June 10, 1987)
1613(a)(1) -- 99 IBLA 213 (Oct. 15, 1987)
1613(c) ------ 95 IBLA 225 (Jan. 16, 1987)
95 IBLA 387 (Feb. 24, 1987)
97 IBLA 342 (May 22, 1987)
98 IBLA 88 (June 10, 1987)
1613(c)(1) -- 96 IBLA 42 (Feb. 27, 1987)
96 IBLA 209 (Mar. 19, 1987)
97 IBLA 261 (May 13, 1987)
97 IBLA 342 (May 22, 1987)
1613(c)(3) -- 98 IBLA 177 (June 24, 1987)

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(C) United States Codes

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ACCOUNTS
(See also Fees, Funds, Payments--if included in this Index.)

FEES AND COMMISSIONS

A simultaneous oil and gas lease applicant is not entitled to a refund of his filing fee unless it is established that BLM knew or should have known that the land was situated within a known geologic structure of a producing oil or gas field at the time it posted the land as available for simultaneous leasing.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

PAYMENTS

If a rental charge required by 43 CFR 2803.1-2 is not paid when due, and such default continues for 30 days after notice, BLM may take action to terminate a right-of-way grant issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982). When the holder of a right-of-way grant has not paid rent for over 2 years, BLM may properly terminate the right-of-way grant.

Aztec Energy Corp., 98 IBLA 372 (Aug. 3, 1987)

A single personal check covering four competitive oil and gas lease bid deposits is not an acceptable form of remittance under 43 CFR 3120.4-1, which requires remittances to be submitted in the form specified in the competitive sale notice, when that notice requires bidders to submit separate bids with a bid deposit by guaranteed remittance, i.e., cash, cashier's check, or postal money order.

George H. Fentress, 99 IBLA 184 (Oct. 13, 1987)

REFUNDS

Refunds of advance rental payments tendered in connection with noncompetitive over-the-counter oil and gas lease offers which are rejected or withdrawn prior to lease issuance are properly issued to the offeror(s), the real party(ies) in interest, pursuant

REFUNDS--Continued

to sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1982).

Frederick Alan Maxwell, 95 IBLA 267 (Jan. 27, 1987)

A simultaneous oil and gas lease applicant is not entitled to a refund of his filing fee unless it is established that BLM knew or should have known that the land was situated within a known geologic structure of a producing oil or gas field at the time it posted the land as available for simultaneous leasing.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

ACCRETION
(See also Boundaries, Public Lands--if included in this Index.)

When a patent to the land incorporates by reference a description of the land as being bounded by a river and the land described in the color-of-title application is for the land accreted to the applicant's property, the applicant as the riparian owner has title to the accreted lands. Neither a color-of-title application nor a sale of the lands to the applicant by BLM would be proper.

Holly H. Baca, Estate of Anthony K. Baca, 97 IBLA 126 (Apr. 30, 1987)

ACQUIRED LANDS

Land acquired by the United States does not become public land by the mere process of its acquisition, and, in the absence of specific legislative or other authoritative direction to the contrary, is not subject to leasing under the mineral leasing laws until the Department formally opens such land for disposition.

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and

ACQUIRED LANDS--Continued

priority among them is determined by drawing in accordance with 43 CFR 1821.2-3.

Roberts & Koch, 95 IBLA 239 (Jan. 16, 1987)

Land acquired by the United States does not become public land by the mere process of its acquisition and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Ted Thompson, 98 IBLA 251 (July 7, 1987)

ACT OF FEBRUARY 8, 1887

Under regulation 43 CFR 2091.5, authorized officers will determine by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by persons other than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

An Indian seeking an Indian allotment in Alaska under the Act of Feb. 8, 1887, has not established settlement under the Act or demonstrated sufficient use and possession to prevent the segregative effect of a grazing lease from attaching by settlement efforts consisting of brief visits to the vicinity of the allotment lands, one extended 30-day stay in the vicinity of the allotment lands, and insubstantial improvements on the land.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

Although neither sec. 4 of the General Allotment Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982), nor the Indian allotment regulations at 43 CFR Part 2530, specifically provide for the cancellation of a certificate of allotment, the Secretary of the

ACT OF FEBRUARY 8, 1887--Continued

Interior, as custodian of the public lands, may cancel such a certificate where he finds that the allottee has not complied with the requirements for issuance of a patent.

Where BLM has classified certain lands for disposal under sec. 4 of the General Allotment Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), and issued a certificate of allotment, it may establish a reasonable time in which the allottee must demonstrate settlement of the land in question. Two years from issuance of the certificate is such a reasonable time.

Where lands are classified for disposal under sec. 4 of the General Allotment Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), as irrigable lands and a certificate of allotment issued, settlement of those lands must include acts to establish the allottee's good faith and intention to, in fact, irrigate and cultivate crops on the land in question.

James Leland Wallace, 100 IBLA 70 (Nov. 30, 1987)

ACT OF JUNE 17, 1902

Land acquired by the United States does not become public land by the mere process of its acquisition and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Ted Thompson, 98 IBLA 251 (July 7, 1987)

ACT OF DECEMBER 29, 1916

A decision approving a bond filed by a mineral claimant of reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed when the owner of the surface estate failed to file objections to issuance of the bond pursuant to 43 CFR 3814.1(d), notwithstanding the fact that the surface owner has filed a civil complaint against the mineral claimant and intends to initiate a private contest against the mineral claimant.

Visintainer Sheep Co., 97 IBLA 63 (Apr. 27, 1987)

ACT OF MARCH 4, 1927

Lands leased under the Act of Mar. 4, 1927, are not subject to settlement, location, and acquisition under the nonmineral land laws applicable to Alaska unless and until the authorized officer determines that the grazing lease should be canceled or reduced.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

ACT OF APRIL 23, 1932

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

ACT OF JULY 31, 1947

When a party has been found to be in trespass as a result of having removed sand and gravel from lands patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), the party must comply with the provisions of 43 CFR 9239.0-9(c) in order to qualify for purchase of additional sand and gravel from the Government. If the party does comply, BLM has the discretion to sell additional sand and gravel to the trespasser pursuant to the provisions of sec. 1 of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1982), and its implementing regulations.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

ACT OF AUGUST 27, 1958

Mining claims located on lands subject to a valid, ongoing, and pre-existing material-site right-of-way granted to the State of Nevada pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

Russell Avery & Douglas E. Noland, 99 IBLA 22 (Aug. 25, 1987)

ACT OF JANUARY 2, 1976

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

ACT OF OCTOBER 30, 1978

Under the regulations at 43 CFR Subpart 3435 which were promulgated to implement, inter alia, the Act of Oct. 30, 1978, P.L. 95-554, 92 Stat. 2073, a coal lease exchange proposal shall be evaluated in terms of whether the exchange is in the public interest. The Act of Oct. 30, 1978, authorizes the Secretary to approve lease exchanges for all or portions of specified existing leases transected by parts of Interstate Highway 90 in Wyoming, in order to avoid conflicts and problems associated with surface mining near or under highways. A decision by the Bureau of Land Management rejecting an exchange proposal submitted under that Act will be vacated when it fails to undertake the public interest determination required by both the regulations at 43 CFR 3435.2(c) and by the terms of an agreement entered into between the coal lessee and the Government.

Belco Petroleum Corp., 96 IBLA 126 (Mar. 11, 1987)

ADMINISTRATIVE AUTHORITY
(See also Delegation of Authority, Federal Employees & Officers, Secretary of the Interior--if included in this Index.)

GENERALLY

A presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

J. R. Holcomb Oil, 96 IBLA 35 (Feb. 27, 1987)

In granting a right-of-way over public lands pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982) (formerly 23 U.S.C. § 18 (1946)), the Secretary of the Interior does not give up administrative authority over the lands subject to the right-of-way.

Kenneth L. Ingram et al., 96 IBLA 290 (Mar. 31, 1987)

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)
94 I.D. 132

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a

GENERALLY--Continued

relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

ESTOPPEL

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Peak River Expeditions (On Reconsideration), 98 IBLA 13 (May 29, 1987)

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

The Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

ADMINISTRATIVE AUTHORITY--Continued

LACHES

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

ADMINISTRATIVE PRACTICE

Standards set forth in an opinion by the Solicitor cannot be applied as substantive requirements governing requests for refunds. The notice which must be filed to request a refund under 43 U.S.C. § 1339 (1982) must be distinguished from the proof necessary to substantiate a refund request.

Conoco Inc., et al., 96 IBLA 384 (Apr. 14, 1987)

The presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

A Government contest complaint which asserts the invalidity of a claim because of insufficient quantity and quality of the located mineral within the limits of the claim does not put into issue the existence of excess reserves within the limits of the claim.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

ADMINISTRATIVE PRACTICE--Continued

Where a hearing into the availability for use of a water supply for a mining operation located within a wilderness study area has previously been held and a final decision rendered on the question, and such determination is dispositive of the question of the feasibility of the plans of mining operations under review, no further factfinding is required.

Far West Exploration, Inc., 100 IBLA 306 (Dec. 28, 1987)

ADMINISTRATIVE PROCEDURE
(See also Appeals, Confidential Information, Contests & Protests, Hearings, Judicial Review, Public Records, Regulations, Rules of Practice--if included in this Index.)

GENERALLY

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that under no set of circumstances can it be entertained, the notice will be addressed without additional briefing.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

It does not matter whether a document filed with the Bureau of Land Management characterizes itself as a request for reconsideration or an appeal. Even though an individual may not characterize the document as an appeal, if the submission challenges the findings of fact or conclusions made by an adverse decision, it must be treated as a notice of appeal.

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)
94 I.D. 132

ADJUDICATION

Standards set forth in an opinion by the Solicitor cannot be applied as substantive requirements governing requests for refunds. The notice which must be filed to request a refund under 43 U.S.C. § 1339 (1982) must be distinguished from the proof necessary to substantiate a refund request.

Conoco Inc., et al., 96 IBLA 384 (Apr. 14, 1987)

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if

ADMINISTRATIVE PROCEDURE--Continued

ADJUDICATION--Continued

the permittee failed to timely seek review of the notice of violation.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

ADMINISTRATIVE LAW JUDGES

Where, in a decision, an Administrative Law Judge rules on the liability for a civil penalty even though liability was never an issue and the full amount of the civil penalty was prepaid prior to the hearing, any question of liability for the civil penalty was moot, and the Board will vacate the ruling.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987) 94 I.D. 181

ADMINISTRATIVE PROCEDURE ACT

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979). It must be based on a grant of power by Congress and be promulgated in accordance with the requirements of the Administrative Procedure Act.

If a rule is substantive, it must be promulgated in accordance with the Administrative Procedure Act in order to have the force and effect of law. If, however, a rule is interpretive, the same proposition is true. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979).

Shell Offshore, Inc., 96 IBLA 149 (Mar. 17, 1987)
94 I.D. 69

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE PROCEDURE ACT--Continued

A notice published in the Federal Register, wherein BLM interprets and clarifies existing regulations to ensure compliance with regulatory provisions at 43 CFR 3102.5, is a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

ADMINISTRATIVE RECORD

In the normal course of review, the Board considers both the legal issues raised by appellants and the specific factual determinations on which the agency's decision was based. Absent a record supporting the agency's factual determinations, the Board cannot sustain a finding applying the relevant law.

Conoco Inc., et al., 96 IBLA 384 (Apr. 14, 1987)

ADMINISTRATIVE REVIEW

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987) 94 I.D. 120

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

Where the Acting Deputy Assistant Secretary--Indian Affairs (Operations) has characterized a decision as discretionary, the Board of Indian Appeals has jurisdiction to review the decision to the extent of the legal conclusions reached.

Navajo Nation v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987) 94 I.D. 172

Departmental regulation 43 CFR 3833.0-5(m), promulgated in Dec. 1982, treats as "timely filed" a mining claim recordation document received by the Bureau of Land Management within 20 days of the statutory deadline for annual mining claim recordation filings if transmitted in an envelope bearing a clearly dated postmark affixed by the United States Postal Service denoting the document was mailed on or before Dec. 30 of the filing year. This regulation took effect Dec. 30, 1982, and in accordance with United States v. Locke, 471 U.S 84, 102 n.14 (1985), it cannot be applied retroactively.

Lindsay Lee Lemons, 98 IBLA 75 (June 9, 1987)

Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

Pursuant to 43 CFR 3165.4 (1986), decisions of BLM officials implementing the onshore oil and gas operating regulations at 43 CFR Subpart 3160 are an exception to the general rule set forth at 43 CFR 4.21(a), and are not automatically stayed pending appeal. Once an appeal to the Board has been filed,

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

requests for suspension are properly filed with the Board of Land Appeals.

Southern Utah Wilderness Alliance, 100 IBLA 63 (Nov. 30, 1987)

BURDEN OF PROOF

A party appealing a BLM easement determination made pursuant to the Alaska Native Claims Settlement Act bears the burden of showing error.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

HEARINGS

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

Norman G. Lavery, 96 IBLA 294 (Mar. 31, 1987)

BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands for a violation of any term or condition of the instrument only after notice and an opportunity for a hearing, unless BLM determines that an immediate temporary suspension is necessary to protect health or safety or the environment, or that other applicable law contains specific provisions for suspension, revocation, or cancellation of a particular land-use authorization.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)
94 I.D. 132

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

A hearing is not necessary in the absence of allegations of a material issue of fact, which, if proven, would alter the disposition of the appeal.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

Where the record presents unresolved questions of fact as to whether there are adequate reasons supporting BLM's departure from the usual method of apportioning accreted lands, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions.

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

RULEMAKING

A notice published in the Federal Register, wherein BLM interprets and clarifies existing regulations to ensure compliance with regulatory provisions at 43 CFR 3102.5, is a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

STANDING

The jurisdiction of the Board of Land Appeals extends to appeals from decisions of Departmental officials regarding the disposition of minerals on public domain and acquired lands pursuant to statutory authority and the regulations promulgated thereunder. As a general rule, this Board has no authority to entertain a claim under the common law of contracts for damages for contract breach and an appeal to this Board predicated on such a ground is properly dismissed for lack of jurisdiction.

Exxon Corp., 95 IBLA 374 (Feb. 18, 1987)

One who is a mere trespasser upon land without claim or color of right does not possess the legally cognizable interest necessary for standing to appeal from a decision granting a conflicting Native allotment application.

James M. Wright, Butch L. Loper, 95 IBLA 387 (Feb. 24, 1987)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

Under 43 CFR 4.410(a), there are two separate and distinct prerequisites to prosecution of an appeal to the Board of Land Appeals: (1) the appellant must be a "party to the case," and (2) the appellant must be "adversely affected" by the decision below.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), does not extend to preclude a mining claim for which no adverse claim was filed during publication of notice of patent proceedings from serving as a foundation for finding standing to appeal.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

AGENCY

One who chooses the means of delivery of a document must accept the responsibility and bear the consequences of delay or nondelivery.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

ALASKA

ALASKA NATIVE CLAIMS SETTLEMENT ACT

Only land available for Native selection under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 1610(a) (1982), is subject to the provisions of the Cook Inlet Region, Inc., amendment requiring that there be consent by affected Native corporations prior to selection by Cook Inlet Region, Inc., of Federal lands located within the regions of other Native corporations.

The prior withdrawal of land under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 610(a) (1982), is a prerequisite to selection of land by a Native village.

Paug Vik, Inc., Ltd., et al., 97 IBLA 235 (May 12, 1987)

ALASKA--Continued

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

GRAZING

When a grazing lessee agrees to an additional stipulation providing that the grazing lease may be terminated upon 30-days notice if the BLM acts upon a state selection application encompassing the leased lands, BLM need not submit a state grazing lease in conjunction with the notice of termination.

Harold Sargent, 100 IBLA 267 (Dec. 15, 1987)

HEADQUARTERS SITES

A notice of location of a headquarters site is properly rejected where at the time of filing the land involved is not unreserved public land because it had been withdrawn from all forms of appropriation under the public land laws by Public Land Order No. 5418 for classification and protection of the public interest.

Mark L. Whitman, 98 IBLA 391 (Aug. 5, 1987)

HOMESITES

Substantial compliance with the law is a prerequisite for the invocation of equitable adjudication to permit consideration of a homesite purchase application that was not filed within the time required.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

ALASKA--Continued

HOMESTEADS

An application to make homestead entry on land subject to a properly filed State selection application under the Alaska Statehood Act is properly rejected.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

When BLM has adjudicated a homestead entry application by allowing it, the rights of the applicant are deemed to relate back to the date of filing of the application and the land embraced by such application is thereby included within an allowed entry. Any applications filed after such date for the same land must be rejected.

John R. Dean, 96 IBLA 239 (Mar. 24, 1987)

LAND GRANTS AND SELECTIONS

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), when land has been tentatively approved for transfer to the State of Alaska, legal title has been conveyed and the Department no longer possesses jurisdiction over the land and has no authority to affect title to it. This rule applies to land on which mining claims have been located when no exception for a mining claim has been made in the decision granting tentative approval.

Charles Renfro, 96 IBLA 311 (Apr. 2, 1987)

Under sec. 6(g) of the Alaska Statehood Act, 72 Stat. 340, the Secretary of the Interior is required, when revoking an existing withdrawal of public land in Alaska, to provide a 90-day period during which time the State of Alaska is afforded a preference right to select the land. Where a public land order revokes a prior withdrawal so as to make the land available for selection by the State, the land may not be simultaneously opened for the location of mining claims for metalliferous minerals, and a public land order purportedly opening such land to mineral location is only effective after the passage

ALASKA--Continued

LAND GRANTS AND SELECTIONS--Continued

of the 90-day period mandated by the Alaska Statehood Act.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

MINING CLAIMS

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), when land has been tentatively approved for transfer to the State of Alaska, legal title has been conveyed and the Department no longer possesses jurisdiction over the land and has no authority to affect title to it. This rule applies to land on which mining claims have been located when no exception for a mining claim has been made in the decision granting tentative approval.

Charles Renfro, 96 IBLA 311 (Apr. 2, 1987)

The "date of location" of a mining claim is "the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel site is situated." 43 CFR 3833.0-5(h). Absent clear evidence to the contrary in a specific case, under Alaska State law the date of location of a mining

ALASKA--Continued

MINING CLAIMS--Continued

claim is the date notice is posted on the claim as recited in the recorded certificate of location.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

NATIVE ALLOTMENTS

A State protest of a Native allotment application filed pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1982), will be considered sufficient to require the adjudication of the application pursuant to the Act of May 17, 1906, as amended, where it identifies in part, with some particularity, a public interest in access to public lands, resources, or bodies of water which could be jeopardized by confirmation of the allotment application.

Where a Native allotment application cannot be legislatively approved pursuant to sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), and there are disputed issues of material fact regarding the applicant's use and occupancy of the land, BLM will be required to initiate a Government contest so that these issues can be resolved at a hearing.

State of Alaska, 95 IBLA 196 (Jan. 14, 1987)

The Bureau of Land Management may reserve a right-of-way for a segment of the Iditarod Trail in its approval of Native allotment applications. Reserving the right-of-way is an exercise of the discretion vested in the Secretary pursuant to sec. 7(h) of the National Trails System Act, 16 U.S.C. § 1246(h) (1982), and the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).

The Bureau of Land Management's decision approving a Native allotment application is an interim step in conveying an allotment to the applicant. The final conveyancing instrument is known as a "Native Allotment." The Department retains jurisdiction over the land in a Native allotment application until it issues the final conveyancing document known as a "Native Allotment." Therefore, at any time prior to final conveyancing, the Department may reserve a public

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

use right-of-way for a designated historic trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982).

In the absence of a dispute as to a material fact, the due process rights of a Native allotment applicant are satisfied by the right to appeal to the Board of Land Appeals from the reservation of a public use right-of-way for a designated trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982), in the approval of a Native allotment application.

Clarence Lockwood et al., 95 IBLA 261 (Jan. 27, 1987)

A State protest against approval of a Native allotment application fails to state with sufficient specificity the facts upon which conclusions concerning public access are made so as to conform to provision of 43 U.S.C. § 1634(a)(5)(B) (1982), where the protest recites that the applied-for land is the site of an existing seaplane base, boat launch, and trail, when it appears none of the claimed improvements are located on the allotment. Since the State's protest does not describe the land claimed by the Native allotment applicant with specificity under such a circumstance, the allotment may be granted to the Native applicant, all else being regular.

There is no authority for the reservation of easements in Native allotments comparable to sec. 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1982), governing reservations of easements in conveyances to Native corporations. An easement across Native corporation lands recognized pursuant to ANCSA may not constitute sufficient grounds for protest of a Native allotment under sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), where the record discloses the route of access reserved in the easement does not cross or abut the Native allotment parcel.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (Feb. 4, 1987)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Under the Alaska National Interest Lands Conservation Act, Native allotment applications pending before the Department on or before Dec. 18, 1971, were approved, subject to valid existing rights and certain exceptions. Approval does not apply where an allotment has been knowingly and voluntarily relinquished. An evidentiary hearing will be ordered where conflicting allegations give rise to an issue as to whether a relinquishment was knowing and voluntary.

Katherine C. (Zimin) Atkins, 95 IBLA 391 (Feb. 24, 1987)

Land withdrawn as a military reservation and subsequently returned by Executive order to the jurisdiction of the Department of the Interior for disposition under the authority of the Act of July 5, 1884, ch. 214, 23 Stat. 103, is not thereby restored to the operation of the public land laws generally. Such land is not vacant, unappropriated, and unreserved, and, hence, a Native allotment application filed for such land alleging use and occupancy commencing after the date of the withdrawal is properly rejected.

Harold Ahmasuk et al., 96 IBLA 42 (Feb. 27, 1987)

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications. Pursuant to this statute a private contest of a Native allotment, based on a claim under the Color of Title Act, filed more than 180 days following enactment of ANILCA, must be dismissed.

William B. Torgramsen, Rosemary Ludvick v. Heirs & Devisees of Carl G. Carlson, 96 IBLA 209 (Mar. 19, 1987)

If a legally sufficient protest is timely filed pursuant to sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1982), the protest takes a Native allotment application out of the purview of sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and the allotment is not legislatively approved. A subsequent withdrawal of the protest would not result in a "revival" of the legislative approval.

When, on appeal, a Native allotment applicant is challenging a survey of the land described in an allotment application claiming it is not the land he intended to apply for, and evidence is submitted indicating the applicant may have executed and submitted a later application prior to repeal of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), the case will be referred for a hearing before an administrative law judge who will determine whether the later application was an amended application pending before the Department on or before Dec. 18, 1971.

Stephen Northway, 96 IBLA 301 (Apr. 2, 1987)

The right of an Alaska Native allotment applicant to amend the description on his application where it designates land other than that which the applicant intended to claim at the time of application provided by sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1982), extends both to unsurveyed lands and those lands surveyed prior to enactment of sec. 905(c). This right, however, terminates upon the establishment, by the Secretary, after proper notice, of a date certain on which all requests for amendment must be received or by the adoption, after Dec. 2, 1980, of a plan of survey for either the originally described or the newly described land.

A Native allotment applicant seeking to amend the description of land contained in his or her allotment application has the burden of establishing that the new description correctly describes the land for which he or she had intended to apply. In adjudicating such requests, BLM is required to consider all evidence in the case file and where such evidence does not clearly

establish that the new description represents the original intent of the Native, BLM may not approve the amendment.

Under the Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the implementing regulations, an allotment applicant must show substantially continuous use and occupancy potentially exclusive of others. Using land for a period of a few days each year does not constitute substantially continuous possession or use and is properly categorized as "intermittent use."

"Potentially exclusive of others." As used in 43 CFR 2561.0-5, the phrase "potentially exclusive of others" means that the nature of the use must be such that any person on the land, under normal circumstances, knew or should have known that the land was subject to the claim of another. Under this standard, use of land solely for picking berries, without more, cannot be deemed potentially exclusive of others and, therefore, cannot establish a right to a Native allotment.

Angeline Galbraith, 97 IBLA 132 (May 6, 1987)
94 I.D. 151

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuangaruak, Mollie Itta, Wilber Ahtuangaruak, 97 IBLA 261 (May 13, 1987)

A duty to reexamine the circumstances of the relinquishment of a Native allotment application in the face of an allegation that it was involuntary and unknowing, notwithstanding the fact the land was subsequently conveyed out of Federal ownership, is founded on the special fiduciary responsibility of the Secretary of the Interior to Native Americans. Hence, a BLM decision refusing a petition by the heirs of a deceased Native allotment applicant to consider a previously relinquished application on the ground the relinquishment was involuntary and unknowing may be set aside and the case remanded to allow consideration of the circumstances of the relinquishment.

Heirs of William A. Lisbourne et al., 97 IBLA 342 (May 22, 1987)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

A right-of-way for an electric transmission line issued, subject to valid existing rights, pursuant to the Act of Mar. 4, 1911, over lands in the open and notorious possession of an Alaska Native cannot diminish the statutory preference right to a Native allotment. Although the preference right is inchoate prior to completion of the required period of qualifying use and occupancy and the filing of a timely application, when the preference right is vested it takes precedence over intervening applications filed subsequent to the commencement of use and occupancy by the Native and the right-of-way will be ineffective to authorize use of lands in the allotment after vesting of the preference right.

Golden Valley Electric Ass'n (On Reconsideration), 98 IBLA 203 (June 29, 1987)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Prior to passage of sec. 905(a)(3) of the Alaska National Interest Lands Conservation Act of 1980, 43 U.S.C. § 1634(a)(3) (1982), lands containing valuable deposits of gravel were considered to be mineral lands unavailable for Native allotment.

The Act of Jan. 2, 1976, P.L. 94-204, 89 Stat. 1146, as amended, 43 U.S.C. § 1613 Note (1982), provides that "all proceeds derived from contracts, leases, permits, rights-of-way, or easements pertaining to lands or resources of lands withdrawn for Native selection" pursuant to the Alaska Native Claims Settlement Act (ANCSA) shall be deposited in an escrow account which shall be held until the lands have been conveyed to the "selecting corporation or individual entitled to receive benefits" under ANCSA. Where lands embracing a valuable deposit of gravel are withdrawn for Native village selection under ANCSA, the proceeds of a material sale contract with the State for the right to mine and remove the gravel are properly placed in the escrow account. Where the land is also within the boundary of an Alaska Native allotment claim pending before the Department on Dec. 18, 1971, which was expressly protected by sec. 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1982), and the selection by the Native village corporation is subsequently relinquished in favor of the Native allotment applicant, the proceeds in the escrow account for such land, upon conveyance to the allottee, are properly paid to the

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

allottee as an individual entitled to receive benefits under ANCSA.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

NAVIGABLE WATERS

Generally

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

OIL AND GAS LEASES

An oil and gas lease offer for lands in Alaska describing the lands sought as less than 2,560 acres or four full sections, whichever is larger, is properly rejected, unless the offer includes all available lands within the subject sections and there are no contiguous lands available for lease.

Isabelle C. Chang, 99 IBLA 282 (Oct. 22, 1987)

POSSESSORY RIGHTS

Under regulation 43 CFR 2091.5, authorized officers will determine by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by persons other than the Indian occupants, upon lands

ALASKA--Continued

POSSESSORY RIGHTS--Continued

in the possession of Indians who have made improvements of any value whatever thereon.

An Indian seeking an Indian allotment in Alaska under the Act of Feb. 8, 1887, has not established settlement under the Act or demonstrated sufficient use and possession to prevent the segregative effect of a grazing lease from attaching by settlement efforts consisting of brief visits to the vicinity of the allotment lands, one extended 30-day stay in the vicinity of the allotment lands, and insubstantial improvements on the land.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

STATEHOOD ACT

A selection application filed under the Alaska Statehood Act for land properly described in the appropriate Bureau of Land Management office segregates the land from all appropriation based upon subsequent application or settlement and location.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

ALASKA--Continued

STATEHOOD ACT--Continued

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

Lands tentatively approved for conveyance to the State of Alaska were legislatively conveyed to the State by sec. 906 of the Alaska National Interest Lands Conservation Act, and consequently the Department may no longer adjudicate unpatented mining claims located upon such lands. Since sec. 314 of the Federal Land Policy and Management Act of 1976 applies only to public lands of the United States, the filing and recording requirements of sec. 314 do not apply to such legislatively conveyed lands, and the statutory filing requirements may not be relied upon to invalidate or otherwise determine the status of unpatented mining claims located on such conveyed lands.

Mary Lou Redmond, 95 IBLA 379 (Feb. 20, 1987)

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications. Pursuant to this statute a private contest of a Native allotment, based on a claim under the Color of Title Act, filed more than 180 days following enactment of ANILCA, must be dismissed.

William B. Torgramsen, Rosemary Ludvick v. Heirs & Devisees of Carl G. Carlson, 96 IBLA 209 (Mar. 19, 1987)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

GENERALLY--Continued

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), when land has been tentatively approved for transfer to the State of Alaska, legal title has been conveyed and the Department no longer possesses jurisdiction over the land and has no authority to affect title to it. This rule applies to land on which mining claims have been located when no exception for a mining claim has been made in the decision granting tentative approval.

Charles Renfro, 96 IBLA 311 (Apr. 2, 1987)

Lands tentatively approved for conveyance to the State of Alaska were legislatively conveyed to the State by sec. 906 of the Alaska National Interest Lands Conservation Act, and consequently the Department may no longer adjudicate the validity of unpatented mining claims located on such lands. Since sec. 314 of the Federal Land Policy and Management Act of 1976 applies only to public lands of the United States, the filing and recording requirements of sec. 314 do not apply to such legislatively conveyed lands, and the statutory filing requirements may not be relied upon to invalidate or otherwise determine the status of unpatented mining claims located on such conveyed lands.

Melvin N. Barry, Frank Simpson, 97 IBLA 359 (May 26, 1987)

DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE ALLOTMENT APPLICANTS

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE ALLOTMENT APPLICANTS--Continued

Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuangaruak, Mollie Itta, Wilber Ahtuangaruak, 97 IBLA 261 (May 13, 1987)

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

NATIVE ALLOTMENTS

A State protest of a Native allotment application filed pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1982), will be considered sufficient to require the adjudication of the application pursuant to the Act of May 17, 1906, as amended, where it

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

identifies in part, with some particularity, a public interest in access to public lands, resources, or bodies of water which could be jeopardized by confirmation of the allotment application.

Where a Native allotment application cannot be legislatively approved pursuant to sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), and there are disputed issues of material fact regarding the applicant's use and occupancy of the land, BLM will be required to initiate a Government contest so that these issues can be resolved at a hearing.

State of Alaska, 95 IBLA 196 (Jan. 14, 1987)

A State protest against approval of a Native allotment application fails to state with sufficient specificity the facts upon which conclusions concerning public access are made so as to conform to provision of 43 U.S.C. § 1634(a)(5)(B) (1982), where the protest recites that the applied-for land is the site of an existing seaplane base, boat launch, and trail, when it appears none of the claimed improvements are located on the allotment. Since the State's protest does not describe the land claimed by the Native allotment applicant with specificity under such a circumstance, the allotment may be granted to the Native applicant, all else being regular.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (Feb. 4, 1987)

If a legally sufficient protest is timely filed pursuant to sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1982), the protest takes a Native allotment application out of the purview of sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and the allotment is not legislatively approved. A subsequent withdrawal of the protest would not result in a "revival" of the legislative approval.

Stephen Northway, 96 IBLA 301 (Apr. 2, 1987)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

The right of an Alaska Native allotment applicant to amend the description on his application where it designates land other than that which the applicant intended to claim at the time of application provided by sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1982), extends both to unsurveyed lands and those lands surveyed prior to enactment of sec. 905(c). This right, however, terminates upon the establishment, by the Secretary, after proper notice, of a date certain on which all requests for amendment must be received or by the adoption, after Dec. 2, 1980, of a plan of survey for either the originally described or the newly described land.

A Native allotment applicant seeking to amend the description of land contained in his or her allotment application has the burden of establishing that the new description correctly describes the land for which he or she had intended to apply. In adjudicating such requests, BLM is required to consider all evidence in the case file and where such evidence does not clearly establish that the new description represents the original intent of the Native, BLM may not approve the amendment.

Under the Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the implementing regulations, an allotment applicant must show substantially continuous use and occupancy potentially exclusive of others. Using land for a period of a few days each year does not constitute substantially continuous possession or use and is properly categorized as "intermittent use."

"Potentially exclusive of others." As used in 43 CFR 2561.0-5, the phrase "potentially exclusive of others" means that the nature of the use must be such that any person on the land, under normal circumstances, knew or should have known that the land was subject to the claim of another. Under this standard, use of land solely for picking berries, without more, cannot be deemed potentially exclusive of others and, therefore, cannot establish a right to a Native allotment.

Angeline Galbraith, 97 IBLA 132 (May 6, 1987)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuangaruak, Mollie Itta, Wilber Ahtuangaruak, 97 IBLA 261 (May 13, 1987)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

STATE SELECTIONS

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

VALID EXISTING RIGHTS

Under the Alaska National Interest Lands Conservation Act, Native allotment applications pending before the Department on or before Dec. 18, 1971, were approved, subject to valid existing rights and certain exceptions. Approval does not apply where an allotment has been knowingly and voluntarily relinquished. An evidentiary hearing will be ordered where conflicting

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

VALID EXISTING RIGHTS--Continued

allegations give rise to an issue as to whether a relinquishment was knowing and voluntary.

Katherine C. (Zimin) Atkins, 95 IBLA 391 (Feb. 24, 1987)

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), all right, title, and interest to tentatively approved land was legislatively conveyed to the State of Alaska, effective from the date of tentative approval. BLM's decision not to include a reservation for the Alaska natural gas transportation system right-of-way grant in a patent to tentatively approved lands will be affirmed, where the right-of-way was granted Dec. 1, 1980, and the lands were tentatively approved Oct. 16, 1963. The applicant has no valid existing rights to such right-of-way through those lands under sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), since the right-of-way was not issued prior to the tentative approval.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

ADMINISTRATIVE PROCEDURE

Decision to Issue Conveyance

An appellant challenging a decision by BLM to approve land for conveyance to a Native corporation pursuant to sec. 14(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(e) (1982), will be deemed to lack standing under 43 CFR 4.410(b) to pursue the appeal of a BLM determination not to reserve a public easement in the conveyance pursuant to 43 U.S.C. § 1616(b)(1) (1976), where the appellant has failed to identify any property interest in public land or has identified only a property interest in private land which is not adversely affected by the decision.

Frances A. Kibble et al., 100 IBLA 261 (Dec. 9, 1987)

Interim Administration

The Act of Jan. 2, 1976, P.L. 94-204, 89 Stat. 1146, as amended, 43 U.S.C. § 1613 Note (1982), provides that "all proceeds derived from contracts, leases, permits, rights-of-way, or easements pertaining to lands or resources of lands withdrawn for Native selection" pursuant to the Alaska Native Claims Settlement Act (ANCSA) shall be deposited in an escrow account which shall be held until the lands have been conveyed to the "selecting corporation or individual entitled to receive benefits" under ANCSA. Where lands embracing a valuable deposit of gravel are withdrawn for Native village selection under ANCSA, the proceeds of a material sale contract with the State for the right to mine and remove the gravel are properly placed in the escrow account. Where the land is also within the boundary of an Alaska Native allotment claim pending before the Department on Dec. 18, 1971, which was expressly protected by sec. 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1982), and the selection by the Native village corporation is subsequently relinquished in favor of the Native allotment applicant, the proceeds in the escrow account for such land, upon conveyance to the allottee, are properly paid to the allottee as an individual entitled to receive benefits under ANCSA.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

APPEALS

Generally

Where a determination of Native group eligibility has been made by the Bureau of Indian Affairs pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the doctrine of administrative finality operates to bar the eligibility issue from consideration in an appeal from a decision approving lands for patent pursuant to sec. 14(h)(2) of the Act, 43 U.S.C. § 1613(h)(2) (1982).

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

Standing

Standing to appeal decisions relating to land selection under the Alaska Native Claims Settlement Act requires that a party have a property interest in land affected by the decision. 43 CFR 4.410(b). The allegation of ownership and use of lands as a member of the public does not establish standing.

The holder of a current permit from the U.S. Fish and Wildlife Service to use lands selected by a Native group has a property interest or valid existing right derived from the permit which is protected under sec. 14(g) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(g) (1982), and such property interest in the land is sufficient to confer standing under 43 CFR 4.410(b) to appeal a decision involving the Native group land selection.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

A party has standing to appeal a Department decision relating to land selections under the Alaska Native Claims Settlement Act, as amended, if the party claims a property interest in land affected by the decision, such as the right to use an existing right-of-way pursuant to a right-of-way use agreement.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

APPEALS--Continued

Standing--Continued

An appellant challenging a decision by BLM to approve land for conveyance to a Native corporation pursuant to sec. 14(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(e) (1982), will be deemed to lack standing under 43 CFR 4.410(b) to pursue the appeal of a BLM determination not to reserve a public easement in the conveyance pursuant to 43 U.S.C. § 1616(b)(1) (1976), where the appellant has failed to identify any property interest in public land or has identified only a property interest in private land which is not adversely affected by the decision.

Frances A. Kibble et al., 100 IBLA 261 (Dec. 9, 1987)

CONVEYANCES

Generally

The Secretary is authorized to convey lands out of a wildlife refuge pursuant to sec. 14(h)(7) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(h)(7) (1982). This authority has not been rescinded by amendments to the National Wildlife Refuge System Administration Act or by the Alaska National Interest Lands Conservation Act.

Departmental regulation 43 CFR 2653.6(b)(1) (1976) precluded Native groups from receiving land benefits under the Alaska Native Claims Settlement Act if the lands selected by them were in a wildlife refuge. However, Secretarial Order No. 3083 of June 17, 1982, issued pursuant to 43 CFR 2650.0-8 which permits the Secretary to waive any nonstatutory regulation promulgated to implement the Alaska Native Claims Settlement Act, waived the bar to conveyance of refuge lands.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Easements

When the United States reserves sec. 17(b) public easements in conveyances to village and regional corporations under the Alaska Native Claims Settlement Act, Department regulations specify that when an existing road is less than 60 feet, "existing road" easements shall be no more than 60 feet wide unless a greater width is justified by "special circumstances." The party alleging the special circumstances warranting a variance bears the burden of proving circumstances exist which necessitate reservation of an easement in excess of 60 feet in width.

A party appealing a BLM easement determination made pursuant to the Alaska Native Claims Settlement Act bears the burden of showing error.

Where BLM reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents should contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way if valid.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

Reconveyances

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Regional Conveyances

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Valid Existing Rights

Third-Party Interests

Where the underlying land has been conveyed to a Native corporation, 43 CFR 2650.4-3 requires that BLM waive administration of a right-of-way pursuant to sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(g) (1982), absent a finding that retention would be in the interest of the United States.

State of Alaska, 97 IBLA 229 (May 11, 1987)

Absent a finding by the Secretary that retention is in the interest of the United States, a BLM decision waiving administration of a public airport lease pursuant to sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(g) (1982), with respect to land conveyed to a Native village corporation, will be affirmed as required by 43 CFR 2650.4-3.

State of Alaska, Dept. of Transportation & Public Facilities, 98 IBLA 88 (June 10, 1987)

Where BLM reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents should contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way if valid.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

Village Conveyances

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

DEFINITIONS

Federal Installation

Where the record on appeal establishes a reasoned basis for reservation of a buffer zone around a shellfish research station to protect water quality and prevent erosion, there is shown a sufficient connection between the creation of such a buffer zone and the Federal administration of the research facility to sustain the determination to retain the buffer zone as part of the station. The lands comprising the buffer zone are not subject to selection by a Native corporation absent a showing that the decision to reserve the lands pursuant to 43 U.S.C. § 1602(e) (1982), was in error.

Seldovia Native Ass'n, Inc., 95 IBLA 177 (Jan. 13, 1987)

Public Lands

Where the record on appeal establishes a reasoned basis for reservation of a buffer zone around a shellfish research station to protect water quality and prevent erosion, there is shown a sufficient connection between the creation of such a buffer zone and the Federal administration of the research facility to sustain the determination to retain the buffer zone as part of the station. The lands comprising the buffer zone are not subject to selection by a Native corporation absent a showing that the decision to reserve the lands pursuant to 43 U.S.C. § 1602(e) (1982), was in error.

Seldovia Native Ass'n, Inc., 95 IBLA 177 (Jan. 13, 1987)

EASEMENTS

Access

There is no authority for the reservation of easements in Native allotments comparable to sec. 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1982), governing reservations of easements in conveyances to Native corporations. An easement across Native corporation lands recognized pursuant to ANCSA may not constitute sufficient grounds for protest of a Native allotment

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

EASEMENTS--Continued

Access--Continued

under sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), where the record discloses the route of access reserved in the easement does not cross or abut the Native allotment parcel.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (Feb. 4, 1987)

Where a mining partnership fails to show that access to its mining claims will be affected by a BLM decision not to reserve a right of public access across lands conveyed to a Native corporation, the BLM decision will be affirmed.

Mespelt & Almasy Mining Co., 99 IBLA 25 (Aug. 26, 1987)

Decision to Reserve

A party appealing a BLM easement determination made pursuant to the Alaska Native Claims Settlement Act bears the burden of showing error.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

Where a mining partnership fails to show that access to its mining claims will be affected by a BLM decision not to reserve a right of public access across lands conveyed to a Native corporation, the BLM decision will be affirmed.

Mespelt & Almasy Mining Co., 99 IBLA 25 (Aug. 26, 1987)

Public Easements

When the United States reserves sec. 17(b) public easements in conveyances to village and regional corporations under the Alaska Native Claims Settlement

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

EASEMENTS--Continued

Public Easements--Continued

Act, Department regulations specify that when an existing road is less than 60 feet, "existing road" easements shall be no more than 60 feet wide unless a greater width is justified by "special circumstances." The party alleging the special circumstances warranting a variance bears the burden of proving circumstances exist which necessitate reservation of an easement in excess of 60 feet in width.

Where BLM reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents should contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way if valid.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

NATIVE LAND SELECTIONS

Generally

When a Native village corporation and a class I municipal corporation are separate corporate entities, the provisions of 43 CFR 2650.6(a) do not apply to permit the Native corporation to select for conveyance those public lands located within 2 miles of the boundaries of the lands administered by the municipal corporation (commonly referred to as the city limits).

City of Nenana, 98 IBLA 177 (June 24, 1987)

Regional Selections

Generally

"Notation rule." Where an Alaska Native corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face in that the land selected is not legally subject to such selection

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

Regional Selections--Continued

Generally--Continued

under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

In the absence of a Master Title Plat or other appropriate land-use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected lands from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation rule as a bar to mining claims located during the pendency of the regional selection.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

Only land available for Native selection under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 1610(a) (1982), is subject to the provisions of the Cook Inlet Region, Inc., amendment requiring that there be consent by affected Native corporations prior to selection by Cook Inlet Region, Inc., of Federal lands located within the regions of other Native corporations.

The prior withdrawal of land under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 610(a) (1982), is a prerequisite to selection of land by a Native village.

Paug Vik, Inc., Ltd., et al., 97 IBLA 235 (May 12, 1987)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

Regional Selections--Continued

Generally--Continued

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

Selection Limitations

Only land available for Native selection under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 1610(a) (1982), is subject to the provisions of the Cook Inlet Region, Inc., amendment requiring that there be consent by affected Native corporations prior to selection by Cook Inlet Region, Inc., of Federal lands located within the regions of other Native corporations.

The prior withdrawal of land under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 610(a) (1982), is a prerequisite to selection of land by a Native village.

Paug Vik, Inc., Ltd., et al., 97 IBLA 235 (May 12, 1987)

Village Selections

The Alaska Native Claims Settlement Act requires the Secretary of the Interior to manage lands selected by a Native village corporation in accordance with applicable laws and regulations. The Secretary may issue rights-of-way over, upon, under, or through such land pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982).

BLM's decision granting a right-of-way for water treatment facilities will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

Village Selections--Continued

interest, and no sufficient reason to disturb the decision is shown. Under 43 CFR 2650.1(a), the decision to issue such a right-of-way on land selected by a Native village corporation under the Alaska Native Claims Settlement Act must consider the views of the village; if the village does not consent to the right-of-way, the Department must balance the public interest against the interests of the village, issuing the right-of-way only if the public interest outweighs the objections of the village.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

NAVIGABLE WATERS

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

PRIMARY PLACE OF RESIDENCE

Criteria

In order for a parcel of land to qualify as a Native's primary place of residence under sec. 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(5) (1982), and the applicable regulations, among other requirements, the land claimed must be used and occupied as of Aug. 31, 1971, and a "dwelling" must be located on the claimed tract. A dwelling located on a tract separate from the tract claimed as the primary place of residence will not satisfy the "dwelling" requirement of sec. 14(h)(5) and 43 CFR 2653.8-2(b)(1).

"Dwelling." Under 43 CFR 2653.8-2(b)(1) a "dwelling" is a house or other structure in which a person or persons live, reside, or habitate. A

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

PRIMARY PLACE OF RESIDENCE--Continued

Criteria--Continued

structure useable only as an emergency shelter is not a dwelling for purposes of this regulation.

Since, under 43 CFR 2653.8-1, an applicant for a primary place of residence is only entitled to such land as was actually used or occupied on Aug. 31, 1971, the applicant must show the requisite use or occupancy for each aliquot 40-acre part of the lands applied for.

United States Forest Service, 98 IBLA 157 (June 24, 1987)

Relinquishment

Under the Alaska National Interest Lands Conservation Act, Native allotment applications pending before the Department on or before Dec. 18, 1971, were approved, subject to valid existing rights and certain exceptions. Approval does not apply where an allotment has been knowingly and voluntarily relinquished. An evidentiary hearing will be ordered where conflicting allegations give rise to an issue as to whether a relinquishment was knowing and voluntary.

Katherine C. (Zimin) Atkins, 95 IBLA 391 (Feb. 24, 1987)

WITHDRAWALS AND RESERVATIONS

Generally

No formal withdrawal is necessary to "withdraw and convey" lands out of the National Wildlife Refuge System pursuant to sec. 14(h)(7) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(7) (1982), because the primary purpose of a withdrawal under the Act is to protect the Native claimant from creation of an intervening interest in the property. No such protection is necessary as the lands have previously been withdrawn for wildlife refuge purposes.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

APPEALS

(See also Administrative Procedure, Contracts, Grazing Permits & Licenses, Indian Probate, Indians, Rules of Practice, Torts, Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970--if included in this Index.)

GENERALLY

A motion to dismiss an appeal on the grounds that the appellant failed to file a timely notice of appeal under 43 CFR 4.411(a) will be denied when the notice of appeal, although incorrectly styled a "protest," was filed in the office of the officer who made the decision within 30 days of service of the decision sought to be reviewed.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that under no set of circumstances can it be entertained, the notice will be addressed without additional briefing.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

The jurisdiction of the Board of Land Appeals extends to appeals from decisions of Departmental officials regarding the disposition of minerals on public domain and acquired lands pursuant to statutory authority and the regulations promulgated thereunder. As a general rule, this Board has no authority to entertain a claim under the common law of contracts for damages for contract breach and an appeal to this Board predicated on such a ground is properly dismissed for lack of jurisdiction.

Exxon Corp., 95 IBLA 374 (Feb. 18, 1987)

APPEALS--Continued

GENERALLY--Continued

One who is a mere trespasser upon land without claim or color of right does not possess the legally cognizable interest necessary for standing to appeal from a decision granting a conflicting Native allotment application.

James M. Wright, Butch L. Loper, 95 IBLA 387 (Feb. 24, 1987)

When a range-line agreement between two licensees provides a division of the range will stand until such time as a range study is conducted, and the range study indicates the allotments do not fairly represent the proportion of range lands each party is entitled to on a demand-forage basis, an Administrative Law Judge's decision finding that one of the licensees may be entitled to an adjustment of grazing privileges and remanding the case to BLM to effect an equalization will be affirmed upon appeal.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status

APPEALS--Continued

GENERALLY--Continued

within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

An appeal supported by a statement of reasons which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered on its own merits.

Mullins Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 333 (Apr. 7, 1987)

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

It does not matter whether a document filed with the Bureau of Land Management characterizes itself as a request for reconsideration or an appeal. Even though an individual may not characterize the document as an appeal, if the submission challenges the findings of fact or conclusions made by an adverse decision, it must be treated as a notice of appeal.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

Under 43 CFR 4.411(a), a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The filing of a notice of appeal in a timely manner is jurisdictional, and failure to file an appeal within the time allowed will result in dismissal of the appeal. 43 CFR 4.401(a) provides a delay in filing may be waived if the document is filed no later than 10 days after the deadline, and the document was transmitted on or before the deadline date. When a notice of appeal was due on or before Nov. 27, 1985, and the postmark

APPEALS--Continued

GENERALLY--Continued

on the envelope shows that it was transmitted Nov. 29, 1985, the delay in filing may not be waived.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

When a Bureau of Land Management decision has been properly appealed to the Board of Land Appeals by an adversely affected party, the Bureau loses jurisdiction over the case and has no authority to take further dispositive action on the subject matter of the appeal. Should the Bureau desire to take such action, it may request that the Board take the action or ask the Board to restore the Bureau's jurisdiction by remanding the case for it to take the action.

Melvin N. Barry, Frank Simpson, 97 IBLA 359 (May 26, 1987)

Where appellant fails to establish entitlement to reimbursement for alleged overcharges of rental, his claim for such reimbursement is properly denied.

Appeal of John R. Haugh, 7 OHA 87 (June 29, 1987)

Appeal of Robert W. Jones, 7 OHA 91 (June 29, 1987)

Appeal of Cyrus J. Sokoll, 7 OHA 95 (June 29, 1987)

APPEALS--Continued

GENERALLY--Continued

Regulation 43 CFR 4.410, setting forth the standard regarding who may appeal to the Board of Land Appeals, contains two separate and discrete prerequisites: (1) that appellant be a party to the case, and (2) that appellant be adversely affected by the decision on appeal. An appeal by a stockholder of a corporation is properly dismissed for lack of standing where the issue raised by appellant is the ownership of the corporation and the decision does not purport to adjudicate that issue.

Greg Williams, 98 IBLA 303 (July 29, 1987)

Under 43 CFR 4.1282(b), notice of appeal must be filed on or before 20 days from the date of receipt of the order or decision sought to be reviewed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

In the Matter of the Rental Rate Appeal of Gary Gissell, 7 OHA 128 (Oct. 16, 1987)

In the Matter of the Rental Rate Appeal of Duncan Hollar, 7 OHA 131 (Oct. 16, 1987)

An appeal from a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

When an issue raised on appeal from a rental rate adjustment for Government-furnished quarters is appropriate for consideration by the agency under 41 CFR 114-52.301(d), the issue will be remanded for such consideration.

A rental rate adjustment for Government-furnished quarters will be upheld when the appellant fails to

APPEALS--Continued

GENERALLY--Continued

submit evidence overcoming the agency's showing of regularity in the adjustment.

In the Matter of the Rental Rate Appeal of Robert E. Johnson, 7 OHA 134 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

A rental rate adjustment for Government-furnished quarters that is based on changes in the Consumer Price Index (CPI) is properly deferred 1 year when a rental rate survey is conducted within 6 months before or after the CPI adjustment is scheduled to be made.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

In the Matter of the Rental Rate Appeal of Ronald M. Mackie, 7 OHA 138 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

The annual Consumer Price Index adjustment to the rental rate for Government-furnished quarters may not be used as a vehicle to challenge a prior regional rental rate survey.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

Notification of a rental rate adjustment for Government-furnished quarters is timely if the notice

APPEALS--Continued

GENERALLY--Continued

of adjustment is mailed to the tenant at least 30 days prior to implementation of the adjustment.

In the Matter of the Rental Rate Appeal of Randolph L. August, 7 OHA 143 (Oct. 16, 1987)

An administrative agency has authority to correct its own erroneous interpretation of law so long as the departure from prior practice is explained and shown not to be arbitrary or capricious.

In the Matter of the Rental Rate Appeal of Nancy A. Hunter, 7 OHA 148 (Oct. 16, 1987)

Where the Forest Service issues a decision determining that certain special stipulations should be included in a readjusted coal lease on National Forest lands and provides the right to appeal that decision through the Forest Service appeals procedures in 36 CFR 211.18, that review procedure must be utilized to challenge directly the special stipulations.

Coastal States Energy Co., 99 IBLA 342 (Nov. 3, 1987)

If an appellant fails to tender the first year's rental and filing fee when appealing from a decision that a simultaneous oil and gas lease application is unacceptable, the appeal will be dismissed for failure to comply with 43 CFR 3112.3(h). If, however, the first year's rental and filing fee have previously been tendered, and have not been refunded at the time of filing a notice of appeal, the previous submittal will suffice.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

APPEALS--Continued

GENERALLY--Continued

A hearing is not necessary in the absence of allegations of a material issue of fact, which, if proven, would alter the disposition of the appeal.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

Pursuant to 43 CFR 3165.4 (1986), decisions of BLM officials implementing the onshore oil and gas operating regulations at 43 CFR Subpart 3160 are an exception to the general rule set forth at 43 CFR 4.21(a), and are not automatically stayed pending appeal. Once an appeal to the Board has been filed, requests for suspension are properly filed with the Board of Land Appeals.

Southern Utah Wilderness Alliance, 100 IBLA 63 (Nov. 30, 1987)

JURISDICTION

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

APPEALS--Continued

JURISDICTION--Continued

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 4.411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

APPLICATIONS AND ENTRIES

GENERALLY

BLM may properly require an applicant under sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), to publish a notice of his application, in accordance with 43 CFR 2541.5, regardless of any prior publication pursuant to state law in connection with a tax sale of the property sought.

Robert E. Richards, 98 IBLA 153 (June 23, 1987)

A mineral patent application does not segregate land from the acquisition of competing rights.

The issue of the validity of a mining claim is the ultimate concern of the Department when a patent

APPLICATIONS AND ENTRIES--Continued

GENERALLY--Continued

application has been made, and the Department necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law.

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

FILING

A selection application filed under the Alaska Statehood Act for land properly described in the appropriate Bureau of Land Management office segregates the land from all appropriation based upon subsequent application or settlement and location.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

APPLICATIONS AND ENTRIES--Continued

PRIORITY

When BLM has adjudicated a homestead entry application by allowing it, the rights of the applicant are deemed to relate back to the date of filing of the application and the land embraced by such application is thereby included within an allowed entry. Any applications filed after such date for the same land must be rejected.

John R. Dean, 96 IBLA 239 (Mar. 24, 1987)

RELINQUISHMENT

A duty to reexamine the circumstances of the relinquishment of a Native allotment application in the face of an allegation that it was involuntary and unknowing, notwithstanding the fact the land was subsequently conveyed out of Federal ownership, is founded on the special fiduciary responsibility of the Secretary of the Interior to Native Americans. Hence, a BLM decision refusing a petition by the heirs of a deceased Native allotment applicant to consider a previously relinquished application on the ground the relinquishment was involuntary and unknowing may be set aside and the case remanded to allow consideration of the circumstances of the relinquishment.

Heirs of William A. Lisbourne et al., 97 IBLA 342 (May 22, 1987)

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

APPLICATIONS AND ENTRIES--Continued

VALID EXISTING RIGHTS

In the absence of favorable action upon a petition to designate the land as suitable for desert land entry, an application for a desert land entry will not be considered a valid existing right excepted from a subsequent withdrawal order, and the application must be rejected by BLM, regardless of any challenge to the propriety and efficacy of the subsequent withdrawal.

Richard S. Gregory, 96 IBLA 256 (Mar. 25, 1987)

APPRAISALS

BLM may, consistent with State law, establish trespass damages for a nonwillful trespass resulting from the unauthorized removal of sand and gravel reserved to the United States in accordance with the royalty value of the material removed set forth in a private lease of that material, as long as the lease was an arm's-length transaction. However, the royalty value must represent only the value of the privilege of mining and removing the material and such use of the surface reasonably incident to mining or removal, as that is the interest reserved.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

Where, in computing the acreage of a parcel of land for purposes of arriving at its fair market value in a conveyance to a color-of-title applicant, BLM relied on planimetric measurements of the parcel as depicted on older survey plats and field notes and there is evidence the acreage may subsequently have changed through erosion or accretion, the Board will remand the case to BLM for a resurvey to determine the acreage actually existing in the tract on the date of appraisal.

The Board will not overturn a BLM appraisal of the fair market value of a parcel of land in a conveyance to a color-of-title applicant where BLM considered the amount of land fit for agricultural use (the highest and best use) in comparing sales of comparable parcels and did not consider the unsubstantiated impact on fair market value of future erosion of the parcel. Fair market value is not controlled by acreage alone, but

APPRAISALS--Continued

depends upon difference in use, character, and productivity.

A color-of-title applicant is properly accorded an equitable deduction from the appraised fair market value of the claimed parcel of land based on the longevity of the applicant's colorable title figured from the date of acquisition by the applicant to the date good faith possession ceased, as well as an equitable deduction based on the length of the applicant's chain of title.

A color-of-title applicant is not entitled to an equitable deduction from the appraised fair market value of the claimed parcel of land based on the increased costs of financing the original purchase due to discovery of a defect in title or any supposed further doubt as to Federal title.

Weathersby Godbold Carter, Richard T. Harriss, III, 97 IBLA 108 (Apr. 29, 1987)

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982) must be made in accordance with generally accepted principles governing the determination of market value.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982), which is supported by documentation in the administrative record, will not be overturned unless it is shown to be unreasonable.

Navajo Nation v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987) 94 I.D. 172

APPRAISALS--Continued

A BLM decision fixing the annual rental for a linear right-of-way issued pursuant to the Mineral Leasing Act, 30 U.S.C. § 185 (1982), in an amount equal to the orignal rental or last uncontested fee is properly affirmed where the right-of-way was originally issued in 1979 and its rental has become subject to adjustment pursuant to 43 CFR 2803.1-2(d). Said rental in the amount of the original rental or last uncontested fee is applicable, pursuant to Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204 (1984), during an interim period while BLM prepares new regulations establishing an approved method for appraising linear rights-of-way.

Northwest Central Pipeline Corp., 97 IBLA 327 (May 21, 1987)

Where BLM grants a communication site right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982) and the grantee fails to file an application for assignment as required by 43 CFR 2803.6-3, rental resulting from a subsequent appraisal may be properly assessed against the grantee. The period of assessment properly included that period the grantee, under a private arrangement, allowed another party to use the right-of-way.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

The right of a surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), for damages to the surface occasioned by the removal of minerals reserved under that Act is limited to the value of crops, permanent improvements, and damages to the land for grazing purposes.

In determining the amount of damages due to the United States for the unauthorized removal of reserved mineral deposits by the surface owner, it is necessary to first ascertain the in-place value of the mineral deposit and then subtract from this figure the amount

APPRAISALS--Continued

of surface damages compensable under 43 U.S.C. § 299 (1970) and 30 U.S.C. § 54 (1982).

United States v. Browne-Tankersley Trust, 98 IBLA 325 (July 31, 1987)

A rental adjustment to a lease of Indian land, which is based on an appraisal employing a sales-price comparison methodology, will be affirmed if it is reasonable, that is, if it is supported in law and by substantial evidence.

Kelly Oil Co. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 249 (Aug. 5, 1987)

A decision imposing fair market rental for a small tract lease will be affirmed where the appraisal determining the fair market rental value is conducted following established criteria, and the lessee fails to show error in the appraisal methods or present convincing evidence that the charges are excessive.

Lawrence Dupuis, 99 IBLA 174 (Oct. 2, 1987)

Sec. 504(g) of the Federal Land Policy and Management Act of 1976 and 43 CFR 2803.1-2(c)(3), permit BLM to charge less than the fair market rental value if the right-of-way holder provides a valuable benefit to the public or to the programs of the Secretary without charge or at reduced rates.

Delbert Jones, 100 IBLA 289 (Dec. 16, 1987)

APPROPRIATIONS
(See also Expenditures, Funds--if included in this Index.)

Sec. 106(h) of the Indian Self-Determination Act, 25 U.S.C. § 450j(h) (1982), does not preclude the use of program funds to pay costs incurred by the Bureau of

APPROPRIATIONS--Continued

Indian Affairs in monitoring and providing technical assistance for a contract under the Act.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987) 94 I.D. 120

ATTORNEY'S FEES

CONTRACT DISPUTES ACT OF 1978

Where the Government has not acted arbitrarily or unreasonably in its negotiations prior to the Board's hearing on the merits of an underlying contract appeal, but facts and explanations become evident at the hearing that the Government would not ordinarily have been expected to know, which evidence ultimately entitles appellant to prevail on its contract claims, then the hearing was clearly essential to the appellant's case and appellant is not entitled to attorney fees or costs, since the Government's position in contesting the claim prior to the hearing was substantially justified.

Stephen J. Kenney (Application for Attorney Fees), IBCA-2132-F (Oct. 8, 1987)

EQUAL ACCESS TO JUSTICE ACT

Substantially Justified

Where the Government has not acted arbitrarily or unreasonably in its negotiations prior to the Board's hearing on the merits of an underlying contract appeal, but facts and explanations become evident at the hearing that the Government would not ordinarily have been expected to know, which evidence ultimately entitles appellant to prevail on its contract claims, then the hearing was clearly essential to the appellant's case and appellant is not entitled to attorney fees or costs, since the Government's position in contesting the claim prior to the hearing was substantially justified.

Stephen J. Kenney (Application for Attorney Fees), IBCA-2132-F (Oct. 8, 1987)

AVULSION

(See also Boundaries, Public Lands--if included in this Index.)

Where BLM has rejected a color-of-title application for land described as being bounded on the north by a river and there is evidence showing that the applicant may in fact have color of title to the land if it avulsed to her property, the decision will be set aside and remanded to BLM for consideration of whether title to the land is in the United States.

Holly H. Baca, Estate of Anthony K. Baca, 97 IBLA 126 (Apr. 30, 1987)

BOARD OF INDIAN APPEALS

GENERALLY

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 105 (Feb. 12, 1987)

On Mar. 11, 1987, the Board of Indian Appeals entered an order in Idaho Mining Corp. v. Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 132 (1987). Although it is not a normal practice of Departmental appeals boards to publish in the I.D.'s any matter which is not a full opinion complete with headnotes, the Idaho Mining order is included for publication because it vacates a previous decision of the Board of Indian Appeals in Idaho Mining Corp. v. Deputy Ass't Secretary--Indian Affairs (Operations), 11 IBIA 249, 90 I.D. 329 (1983).

Idaho Mining Corp. v. Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 132 (Mar. 11, 1987) 94 I.D. 68

BOARD OF INDIAN APPEALS--Continued

GENERALLY--Continued

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987) 94 I.D. 120

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

The Board of Indian Appeals has authority to interpret tribal law in order to review decisions made by the Bureau of Indian Affairs.

Menominee Tribal Enterprises v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 263 (Aug. 12, 1987)

A petition for reconsideration based on arguments already considered by the Board of Indian Appeals in its initial decision does not demonstrate extraordinary circumstances warranting reconsideration under 43 CFR 4.315.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 271 (Aug. 19, 1987)

JURISDICTION

The Board of Indian Appeals does not have authority to declare invalid a duly promulgated Departmental regulation.

Northern Natural Gas v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 124 (Mar. 2, 1987)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Approval of conveyances of Indian trust or restricted land is committed to the discretion of the Bureau of Indian Affairs. In reviewing such approvals, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Theodore B. White v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 142 (Mar. 27, 1987)

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedure in 25 CFR Part 271.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987) 94 I.D. 120

Where the Acting Deputy Assistant Secretary--Indian Affairs (Operations) has characterized a decision as discretionary, the Board of Indian Appeals has jurisdiction to review the decision to the extent of the legal conclusions reached.

Navajo Nation v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987) 94 I.D. 172

Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

The fact that an Indian probate appeal is pending before the Board of Indian Appeals does not give the Board jurisdiction over an allegedly related Bureau of Indian Affairs decision which has no effect on the decision on appeal.

Estate of Frank Tooahimpah, 15 IBIA 258 (Aug. 10, 1987)

Although the Board of Indian Appeals does not have general review jurisdiction over decisions of the Assistant Secretary--Indian Affairs, 43 CFR 4.330 permits the Assistant Secretary to refer any matter concerning Indians to the Board.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

A tribal official who received adequate notice of tribal proceedings to remove him/her from office but who failed to exhaust tribal remedies may not challenge the tribal proceedings in a Department of the Interior forum.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 9 (Nov. 19, 1987)

BOARD OF LAND APPEALS

Pursuant to provision of 30 U.S.C. § 1276(a)(1) (1982) an attack upon the validity of the Secretary's regulations published pursuant to the Surface Mining Control and Reclamation Act of 1977 may be heard only in the United States District Court for the District of Columbia. An attack upon the validity of 30 CFR

BOARD OF LAND APPEALS--Continued

843.12(a)(2) may not, as a consequence, be entertained by the Interior Board of Land Appeals.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

A party asserting a claim of estoppel based on a misrepresentation must be ignorant of the true facts and his reliance on the misrepresentation must be reasonable under the circumstances. Where appellant knew certain oil and gas leases were allegedly expired for lack of production from a communitized well, BLM will not be estopped to hold the leases expired based on a representation of a BLM employee without knowledge of the production status that, based on the records, the leases were in effect.

Landmark Exploration Co., 97 IBLA 96 (Apr. 29, 1987)

BOARD OF LAND APPEALS--Continued

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Peak River Expeditions (On Reconsideration), 98 IBLA 13 (May 29, 1987)

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

The Board of Land Appeals need not decide whether a permittee could retroactively take advantage of an amended regulation allowing for extensions of the abatement period where there is no evidence in the record which would show affirmatively the permittee's entitlement to such an extension, even if it were available.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

BOUNDARIES
(See also Accretion, Avulsion, Public Lands, Reliction, Surveys of Public Lands--if included in this Index.)

When a patent to the land incorporates by reference a description of the land as being bounded by a river and the land described in the color-of-title application is for the land accreted to the applicant's property, the applicant as the riparian owner has title to the accreted lands. Neither a color-of-title application nor a sale of the lands to the applicant by BLM would be proper.

Where BLM has rejected a color-of-title application for land described as being bounded on the north by a river and there is evidence showing that the applicant may in fact have color of title to the land if it avulsed to her property, the decision will be set aside and remanded to BLM for consideration of whether title to the land is in the United States.

Holly H. Baca, Estate of Anthony K. Baca, 97 IBLA 126 (Apr. 30, 1987)

BUREAU OF INDIAN AFFAIRS
(See also Indian Probate--if included in this Index.)

GENERALLY

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body.

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 105 (Feb. 12, 1987)

Sec. 106(h) of the Indian Self-Determination Act, 25 U.S.C. § 450j(h) (1982), does not preclude the use of program funds to pay costs incurred by the Bureau of

BUREAU OF INDIAN AFFAIRS--Continued

GENERALLY--Continued

Indian Affairs in monitoring and providing technical assistance for a contract under the Act.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987) 94 I.D. 120

Confusion and potentially conflicting decisions would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

Bureau of Indian Affairs agency Superintendents are not empowered by 25 CFR 115.11(b) to authorize disbursements from the Individual Indian Money account of a deceased Indian for funeral expenses without the approval of an Administrative Law Judge (Indian Probate).

In the Matter of the Estate of Madeline Bone Wells, 15 IBIA 165 (Apr. 1, 1987)

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

The Board of Indian Appeals has authority to interpret tribal law in order to review decisions made by the Bureau of Indian Affairs.

Menominee Tribal Enterprises v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 263 (Aug. 12, 1987)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS

Generally

Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

A tribal official who received adequate notice of tribal proceedings to remove him/her from office but who failed to exhaust tribal remedies may not challenge the tribal proceedings in a Department of the Interior forum.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 9 (Nov. 19, 1987)

Discretionary Decisions

Where the Acting Deputy Assistant Secretary--Indian Affairs (Operations) has characterized a decision as discretionary, the Board of Indian Appeals has jurisdiction to review the decision to the extent of the legal conclusions reached.

Navajo Nation v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987) 94 I.D. 172

Filing

Mandatory Time Limit

An appeal from a Bureau of Indian Affairs decision under 25 CFR Part 2 is timely if the notice of appeal

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Filing--Continued

Mandatory Time Limit--Continued

is filed within 30 days after appellant's receipt of the decision being appealed.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

Leases

The role of the Board of Indian Appeals in reviewing a rental adjustment in a lease of Indian land is to determine whether the adjustment is reasonable, that is, whether it is supported by law and substantial evidence. If it is reasonable, the Board will not substitute its judgment for that of the Bureau of Indian Affairs, but the Board must overturn an adjustment that is not reasonable.

Frank Gamble v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 101 (Feb. 5, 1987)

The Bureau of Indian Affairs is not estopped from reversing an approval of a lease document given in error.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

BUREAU OF LAND MANAGEMENT
(See also Mineral Leasing Act--if included in this Index.)

When subsequent to execution of a mineral material sales contract, the Department has amended the regulation providing for automatic termination of such a contract for failure to submit an in lieu of minimum annual production payment on or before the anniversary date by giving the authorized officer discretionary authority to terminate, the Board will set aside a BLM decision holding the contract to have automatically

BUREAU OF LAND MANAGEMENT--Continued

terminated and remand the case to BLM to allow the exercise of its discretion.

T. Brown Constructors, Inc., 95 IBLA 107 (Jan. 6, 1987)

The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal valves as required by 43 CFR 3162.7-4(b)(1).

Hardy Salt Co., 96 IBLA 39 (Feb. 27, 1987)

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)
94 I.D. 132

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

BUREAU OF LAND MANAGEMENT--Continued

A determination to not waive a breach of contract for sales of mineral materials will not be overturned absent a showing that the determination is arbitrary, capricious, or not in the best interest of the Federal Government.

T. Brown Constructors, Inc., 98 IBLA 1 (May 28, 1987)

The BLM may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7(b)(1).

Mingo Oil Producers (On Reconsideration), 98 IBLA 133 (June 22, 1987)

CLAIMS AGAINST THE UNITED STATES
(See also Contracts, Federal Employees & Officers, Irrigation Claims, Torts--if included in this Index.)

GENERALLY

The jurisdiction of the Board of Land Appeals extends to appeals from decisions of Departmental officials regarding the disposition of minerals on public domain and acquired lands pursuant to statutory authority and the regulations promulgated thereunder. As a general rule, this Board has no authority to entertain a claim under the common law of contracts for damages for contract breach and an appeal to this Board predicated on such a ground is properly dismissed for lack of jurisdiction.

Exxon Corp., 95 IBLA 374 (Feb. 18, 1987)

COAL LEASES AND PERMITS
(See also Mineral Leasing Act--if included in this Index.)

LEASES

Under the regulations at 43 CFR Subpart 3435 which were promulgated to implement, inter alia, the Act of Oct. 30, 1978, P.L. 95-554, 92 Stat. 2073, a coal lease exchange proposal shall be evaluated in terms of whether the exchange is in the public interest. The Act of Oct. 30, 1978, authorizes the Secretary to approve lease exchanges for all or portions of specified existing leases transected by parts of Interstate Highway 90 in Wyoming, in order to avoid conflicts and problems associated with surface mining near or under highways. A decision by the Bureau of Land Management rejecting an exchange proposal submitted under that Act will be vacated when it fails to undertake the public interest determination required by both the regulations at 43 CFR 3435.2(c) and by the terms of an agreement entered into between the coal lessee and the Government.

Belco Petroleum Corp., 96 IBLA 126 (Mar. 11, 1987)

The Board of Land Appeals will not reverse as unreasonable a readjustment of a coal lease to establish a 12-1/2-percent production royalty on the value of coal produced by strip or auger methods, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982) if needed.

Ark Land Co. (On Reconsideration), 96 IBLA 140 (Mar. 11, 1987)

BLM is not barred from readjusting all the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 201-209 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is given prior to the end of the 20-year primary term of the lease.

Where stipulations included in a readjusted coal lease do not recognize the extent to which a lessee has already conducted activities on the leased lands, those stipulations must be amended to clarify the extent to which appellant's existing operations are

affected and to ensure that mere acceptance does not constitute a violation.

Kerr-McGee Coal Corp., 96 IBLA 280 (Mar. 26, 1987)

When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may, within the time provided in 43 CFR 3451.1, subsequently provide the specific terms and conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions challenged by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands.

In accordance with 30 U.S.C. § 207(a) (1982), readjusted lease terms will provide that royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine. Pursuant to 43 CFR 3473.3-2(a)(3), royalty for coal removed by underground methods will be 8 percent unless the lessee establishes that conditions warrant a lower amount, but in no case shall the lease term provide for less than 5-percent royalty for coal removed by underground operations. In the absence of either ongoing underground mining operations or a pending resource recovery and protection plan which contemplates underground operations, a lessee cannot establish that conditions warrant the imposition of less than an 8-percent royalty as a readjusted term.

The decisions of the Board of Land Appeals are final for the Department upon issuance. Thus, absent affirmative action by a Federal Court, a decision of a State Office directing an increase in bonding levels based on increased rental and royalty rates under readjusted lease terms which have been approved by the Board will be affirmed, even though the decision

COAL LEASES AND PERMITS--Continued

LEASES--Continued

readjusting the rental and royalty rates is the subject of a suit for judicial review.

Ark Land Co., 97 IBLA 241 (May 13, 1987)

Notice of intent to readjust a coal lease given to a lessee prior to expiration of the period allowed for readjustment is effective to permit readjustment, even though BLM does not provide the specific terms or conditions for readjustment until after the expiration of the period.

If, based on information obtainable from the results of operations or from information available in a resource recovery and reclamation plan, it can be established that conditions warrant doing so, the authorized officer may set a royalty rate for an underground mine at less than 8 percent but not less than 5 percent.

Western Fuels-Utah, Inc., 98 IBLA 114 (June 16, 1987)

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

Where the Forest Service issues a decision determining that certain special stipulations should be included in a readjusted coal lease on National Forest lands and provides the right to appeal that decision through the Forest Service appeals procedures in 36 CFR 211.18, that review procedure must be utilized to challenge directly the special stipulations.

In accordance with 43 CFR 3473.3-2(a)(3), the BLM authorized officer may, if conditions warrant, set a royalty rate of less than 8 percent, but not less than 5 percent, for coal removed from an underground mine. However, where BLM has established an 8-percent royalty rate, and, on appeal, the lessee argues that conditions warrant a lesser rate, the Board need not remand for a determination by BLM, but will affirm, where the record

COAL LEASES AND PERMITS--Continued

LEASES--Continued

shows the lease is nonproducing and no production is expected in the near future.

Coastal States Energy Co., 99 IBLA 342 (Nov. 3, 1987)

READJUSTMENT

The Board of Land Appeals will not reverse as unreasonable a readjustment of a coal lease to establish a 12-1/2-percent production royalty on the value of coal produced by strip or auger methods, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982) if needed.

Ark Land Co. (On Reconsideration), 96 IBLA 140 (Mar. 11, 1987)

BLM is not barred from readjusting all the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 201-209 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is given prior to the end of the 20-year primary term of the lease.

Where stipulations included in a readjusted coal lease do not recognize the extent to which a lessee has already conducted activities on the leased lands, those stipulations must be amended to clarify the extent to which appellant's existing operations are affected and to ensure that mere acceptance does not constitute a violation.

Kerr-McGee Coal Corp., 96 IBLA 280 (Mar. 26, 1987)

When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may,

COAL LEASES AND PERMITS--Continued

READJUSTMENT--Continued

within the time provided in 43 CFR 3451.1, subsequently provide the specific terms and conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions challenged by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands.

In accordance with 30 U.S.C. § 207(a) (1982), readjusted lease terms will provide that royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine. Pursuant to 43 CFR 3473.3-2(a)(3), royalty for coal removed by underground methods will be 8 percent unless the lessee establishes that conditions warrant a lower amount, but in no case shall the lease term provide for less than 5-percent royalty for coal removed by underground operations. In the absence of either ongoing underground mining operations or a pending resource recovery and protection plan which contemplates underground operations, a lessee cannot establish that conditions warrant the imposition of less than an 8-percent royalty as a readjusted term.

The decisions of the Board of Land Appeals are final for the Department upon issuance. Thus, absent affirmative action by a Federal Court, a decision of a State Office directing an increase in bonding levels based on increased rental and royalty rates under readjusted lease terms which have been approved by the Board will be affirmed, even though the decision readjusting the rental and royalty rates is the subject of a suit for judicial review.

Ark Land Co., 97 IBLA 241 (May 13, 1987)

COAL LEASES AND PERMITS--Continued

READJUSTMENT--Continued

Notice of intent to readjust a coal lease given to a lessee prior to expiration of the period allowed for readjustment is effective to permit readjustment, even though BLM does not provide the specific terms or conditions for readjustment until after the expiration of the period.

If, based on information obtainable from the results of operations or from information available in a resource recovery and reclamation plan, it can be established that conditions warrant doing so, the authorized officer may set a royalty rate for an underground mine at less than 8 percent but not less than 5 percent.

Western Fuels-Utah, Inc., 98 IBLA 114 (June 16, 1987)

Readjustment of a coal lease is not timely where, prior to the end of the second 20-year period of the lease in 1974, BLM gave the lessee notice of BLM's intention to readjust the lease, but thereafter ensued a 5-year delay in furnishing appellant the proposed lease terms and an additional 6-year delay in responding to appellant's objections to the proposed lease terms.

Atlantic Richfield Co., 99 IBLA 179 (Oct. 9, 1987)

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

Where the Forest Service issues a decision determining that certain special stipulations should be included in a readjusted coal lease on National Forest lands and provides the right to appeal that decision through the Forest Service appeals procedures in 36 CFR 211.18, that review procedure must be utilized to challenge directly the special stipulations.

COAL LEASES AND PERMITS--Continued

READJUSTMENT--Continued

In accordance with 43 CFR 3473.3-2(a)(3), the BLM authorized officer may, if conditions warrant, set a royalty rate of less than 8 percent, but not less than 5 percent, for coal removed from an underground mine. However, where BLM has established an 8-percent royalty rate, and, on appeal, the lessee argues that conditions warrant a lesser rate, the Board need not remand for a determination by BLM, but will affirm, where the record shows the lease is nonproducing and no production is expected in the near future.

Coastal States Energy Co., 99 IBLA 342 (Nov. 3, 1987)

ROYALTIES

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(b) (1982), requires continued operation of a lease that has achieved diligent development. However, the requirement may be suspended upon application and payment of advance royalties. The failure to make advance royalty payments in lieu of continued operation subjects the lease to cancellation.

Western Slope Carbon, Inc., 98 IBLA 198 (June 29, 1987)

COLOR OR CLAIM OF TITLE

GENERALLY

An applicant for land under the Color of Title Act, 43 U.S.C. § 1068 (1982), must hold the land in good faith for 20 years, in order to obtain a patent. If an applicant admits that, during the time he claimed the land, he knew the United States owned the land, he does not have "good faith" under that Act and his application is properly rejected.

Walter Grant Kreuter, 95 IBLA 291 (Jan. 29, 1987)

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

Under 43 U.S.C. § 1068(b) (1982), one who files a class 2 color-of-title application is required to establish, inter alia, that the tract applied for has been held in good faith and in peaceful, adverse possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application, during which time they have paid taxes levied on the land by state and local governmental units. BLM properly rejects a class 2 application where these requirements are not met.

Agee S. Broughton, Jr. (Trustee), 95 IBLA 343 (Feb. 4, 1987)

BLM properly rejects a class 2 color-of-title application if the applicant fails to submit evidence showing payment of taxes levied on the land for the period commencing not later than Jan. 1, 1901, to the date of application.

Where in a decision rejecting a class 2 color-of-title application BLM observes that the applicant also failed to meet the class 1 requirements because valuable improvements were not placed on the land nor were the lands reduced to cultivation, but the record indicates appellant engaged in forestry practices on such land, the decision will be vacated in part and the case remanded to allow the applicant to submit a class 1 application detailing those practices in support of the position that valuable improvements were placed on the land.

Soterra, Inc., 95 IBLA 352 (Feb. 11, 1987)

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications. Pursuant to this statute a private contest of a Native allotment, based on a claim under

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

the Color of Title Act, filed more than 180 days following enactment of ANILCA, must be dismissed.

William B. Torgramsen, Rosemary Ludvick v. Heirs & Devisees of Carl G. Carlson, 96 IBLA 209 (Mar. 19, 1987)

The Department cannot grant a color-of-title application for land that was patented and is no longer public land.

One who files a class 2 color-of-title application is required by 43 U.S.C. § 1068(b) (1982) to establish, inter alia, that the tract applied for has been held in good faith and in peaceful, adverse, possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application during which time they have paid taxes levied on the land by state and local governmental units. The statute does not give BLM the authority to grant a class 2 application where there is no evidence the lands applied for were included in lands conveyed to the applicants.

Wilbur C. Nemitz et al., 97 IBLA 121 (Apr. 30, 1987)

BLM may properly require an applicant under sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), to publish a notice of his application, in accordance with 43 CFR 2541.5, regardless of any prior publication pursuant to state law in connection with a tax sale of the property sought.

Robert E. Richards, 98 IBLA 153 (June 23, 1987)

Although equitable title to land claimed under a class I color-of-title application filed pursuant to 43 U.S.C. § 1068 (1982), vests upon compliance with the statutory requirements coupled with the filing of an application with BLM, this does not establish a right in the applicant to the proceeds accruing from oil and

COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

gas development subsequent to the application and prior to issuance of patent.

Albert M. Lipscomb, 99 IBLA 217 (Oct. 15, 1987)

An applicant who believes or has reason to believe that title to land is in the United States at the time when the applicant acquires title to the land has not established the good faith necessary to support a color-of-title claim.

Patti L. Keith, 100 IBLA 89 (Nov. 30, 1987)

APPLICATIONS

An applicant for land under the Color of Title Act, 43 U.S.C. § 1068 (1982), must hold the land in good faith for 20 years, in order to obtain a patent. If an applicant admits that, during the time he claimed the land, he knew the United States owned the land, he does not have "good faith" under that Act and his application is properly rejected.

Walter Grant Kreuter, 95 IBLA 291 (Jan. 29, 1987)

Under 43 U.S.C. § 1068(b) (1982), one who files a class 2 color-of-title application is required to establish, inter alia, that the tract applied for has been held in good faith and in peaceful, adverse possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application, during which time they have paid taxes levied on the land by state and local governmental units. BLM properly rejects a class 2 application where these requirements are not met.

Agee S. Broughton, Jr. (Trustee), 95 IBLA 343 (Feb. 4, 1987)

COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS--Continued

BLM properly rejects a class 2 color-of-title application if the applicant fails to submit evidence showing payment of taxes levied on the land for the period commencing not later than Jan. 1, 1901, to the date of application.

Soterra, Inc., 95 IBLA 352 (Feb. 11, 1987)

The Department cannot grant a color-of-title application for land that was patented and is no longer public land.

One who files a class 2 color-of-title application is required by 43 U.S.C. § 1068(b) (1982) to establish, inter alia, that the tract applied for has been held in good faith and in peaceful, adverse, possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application during which time they have paid taxes levied on the land by state and local governmental units. The statute does not give BLM the authority to grant a class 2 application where there is no evidence the lands applied for were included in lands conveyed to the applicants.

Wilbur C. Nemitz et al., 97 IBLA 121 (Apr. 30, 1987)

When a patent to the land incorporates by reference a description of the land as being bounded by a river and the land described in the color-of-title application is for the land accreted to the applicant's property, the applicant as the riparian owner has title to the accreted lands. Neither a color-of-title application nor a sale of the lands to the applicant by BLM would be proper.

Where BLM has rejected a color-of-title application for land described as being bounded on the north by a river and there is evidence showing that the applicant may in fact have color of title to the land if it avulsed to her property, the decision will be set aside and remanded to BLM for consideration of whether title to the land is in the United States.

Holly H. Baca, Estate of Anthony K. Baca, 97 IBLA 126 (Apr. 30, 1987)

COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS--Continued

Although equitable title to land claimed under a class I color-of-title application filed pursuant to 43 U.S.C. § 1068 (1982), vests upon compliance with the statutory requirements coupled with the filing of an application with BLM, this does not establish a right in the applicant to the proceeds accruing from oil and gas development subsequent to the application and prior to issuance of patent.

Albert M. Lipscomb, 99 IBLA 217 (Oct. 15, 1987)

An applicant who believes or has reason to believe that title to land is in the United States at the time when the applicant acquires title to the land has not established the good faith necessary to support a color-of-title claim.

Patti L. Keith, 100 IBLA 89 (Nov. 30, 1987)

APPRAISED VALUE

Where, in computing the acreage of a parcel of land for purposes of arriving at its fair market value in a conveyance to a color-of-title applicant, BLM relied on planimetric measurements of the parcel as depicted on older survey plats and field notes and there is evidence the acreage may subsequently have changed through erosion or accretion, the Board will remand the case to BLM for a resurvey to determine the acreage actually existing in the tract on the date of appraisal.

The Board will not overturn a BLM appraisal of the fair market value of a parcel of land in a conveyance to a color-of-title applicant where BLM considered the amount of land fit for agricultural use (the highest and best use) in comparing sales of comparable parcels and did not consider the unsubstantiated impact on fair market value of future erosion of the parcel. Fair market value is not controlled by acreage alone, but depends upon difference in use, character, and productivity.

A color-of-title applicant is properly accorded an equitable deduction from the appraised fair market value of the claimed parcel of land based on the longevity of the applicant's colorable title figured

COLOR OR CLAIM OF TITLE--Continued

APPRAISED VALUE--Continued

from the date of acquisition by the applicant to the date good faith possession ceased, as well as an equitable deduction based on the length of the applicant's chain of title.

A color-of-title applicant is not entitled to an equitable deduction from the appraised fair market value of the claimed parcel of land based on the increased costs of financing the original purchase due to discovery of a defect in title or any supposed further doubt as to Federal title.

Weathersby Godbold Carter, Richard T. Harriss, III, 97 IBLA 108 (Apr. 29, 1987)

Although equitable title to land claimed under a class I color-of-title application filed pursuant to 43 U.S.C. § 1068 (1982), vests upon compliance with the statutory requirements coupled with the filing of an application with BLM, this does not establish a right in the applicant to the proceeds accruing from oil and gas development subsequent to the application and prior to issuance of patent.

Albert M. Lipscomb, 99 IBLA 217 (Oct. 15, 1987)

GOOD FAITH

An applicant for land under the Color of Title Act, 43 U.S.C. § 1068 (1982), must hold the land in good faith for 20 years, in order to obtain a patent. If an applicant admits that, during the time he claimed the land, he knew the United States owned the land, he does not have "good faith" under that Act and his application is properly rejected.

Walter Grant Kreuter, 95 IBLA 291 (Jan. 29, 1987)

COLOR OR CLAIM OF TITLE--Continued

GOOD FAITH--Continued

An applicant who believes or has reason to believe that title to land is in the United States at the time when the applicant acquires title to the land has not established the good faith necessary to support a color-of-title claim.

Patti L. Keith, 100 IBLA 89 (Nov. 30, 1987)

IMPROVEMENTS

Where in a decision rejecting a class 2 color-of-title application BLM observes that the applicant also failed to meet the class 1 requirements because valuable improvements were not placed on the land nor were the lands reduced to cultivation, but the record indicates appellant engaged in forestry practices on such land, the decision will be vacated in part and the case remanded to allow the applicant to submit a class 1 application detailing those practices in support of the position that valuable improvements were placed on the land.

Soterra, Inc., 95 IBLA 352 (Feb. 11, 1987)

COMMUNICATION SITES

Where BLM grants a communication site right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982) and the grantee fails to file an application for assignment as required by 43 CFR 2803.6-3, rental resulting from a subsequent appraisal may be properly assessed against the grantee. The period of assessment properly included that period the grantee, under a private arrangement, allowed another party to use the right-of-way.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

CONFIDENTIAL INFORMATION
(See also Administrative Procedure: Public Information, Public Records--if included in this Index.)

If the terms of a Federal-State cooperative agreement entered into pursuant to 43 U.S.C. § 1352 (1982), provide that an oil and gas lease issued by the Federal Government is to be issued and administered pursuant to Federal laws, Federal laws and regulations pertaining to release of confidential information will apply. If a decision to release such information comports with Federal law the release of the information is not a breach of discretionary authority.

Shell Western Exploration & Production, Inc., 96 IBLA 244 (Mar. 24, 1987)

CONSTITUTIONAL LAW

GENERALLY

Based on the decision of the U.S. Supreme Court in Hodel v. Irving, ____ U.S. ____, 55 U.S.L.W. 4653 (U.S. May 18, 1987), that the escheat provisions of sec. 207 of the Indian Land Consolidation Act, as originally enacted, 96 Stat. 2519, are unconstitutional, escheats under that section must be disapproved in cases still pending for administrative determination.

Estate of Katie DeLaCruz & Estate of James Herbert Scarborough, 15 IBIA 198 (May 26, 1987)

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

CONSTITUTIONAL LAW--Continued

DUE PROCESS

In the absence of a dispute as to a material fact, the due process rights of a Native allotment applicant are satisfied by the right to appeal to the Board of Land Appeals from the reservation of a public use right-of-way for a designated trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982), in the approval of a Native allotment application.

Clarence Lockwood et al., 95 IBLA 261 (Jan. 27, 1987)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Heirs of Doreen Itta, Bernice Ahtuangaruak, Mollie Itta, Wilber Ahtuangaruak, 97 IBLA 261 (May 13, 1987)

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

CONTESTS AND PROTESTS
(See also Administrative Procedure, Rules of Practice--if included in this Index.)

GENERALLY

A State protest of a Native allotment application filed pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1982), will be considered sufficient to require the adjudication of the application pursuant to the Act of May 17, 1906, as amended, where it identifies in part, with some particularity, a public interest in access to public lands, resources, or bodies of water which could be jeopardized by confirmation of the allotment application.

State of Alaska, 95 IBLA 196 (Jan. 14, 1987)

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

A State protest against approval of a Native allotment application fails to state with sufficient specificity the facts upon which conclusions concerning public access are made so as to conform to provision of 43 U.S.C. § 1634(a)(5)(B) (1982), where the protest recites that the applied-for land is the site of an existing seaplane base, boat launch, and trail, when it appears none of the claimed improvements are located on the allotment. Since the State's protest does not describe the land claimed by the Native allotment applicant with specificity under such a circumstance, the allotment may be granted to the Native applicant, all else being regular.

There is no authority for the reservation of easements in Native allotments comparable to sec. 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1982), governing reservations of easements in conveyances to Native corporations. An easement across Native corporation lands recognized pursuant to ANCSA may not constitute sufficient grounds for protest of a Native allotment under sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), where the record discloses the route of access reserved in the easement does not cross or abut the Native allotment parcel.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (Feb. 4, 1987)

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications. Pursuant to this statute a private contest of a Native allotment, based on a claim under the Color of Title Act, filed more than 180 days following enactment of ANILCA, must be dismissed.

William B. Torgramsen, Rosemary Ludvick v. Heirs & Devisees of Carl G. Carlson, 96 IBLA 209 (Mar. 19, 1987)

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

Although BLM may properly declare mining claims abandoned on the basis of a state court decision on the rights of rival claimants to possession, it should not do so until the state appellate court review process is complete.

Alvin L. Kile, Leslie L. Maxwell, 97 IBLA 6 (Apr. 17, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

A protest of a BLM declaration that a party is the successful high bidder at a timber sale is not a protest of a timber management decision governed by 43 CFR 5003.3, as the protesting party has no way of knowing who may bid at the sale or who will submit the high bid at the time a decision to conduct a sale is published. The regulations applicable to such protests are those found at 43 CFR 4.450-2.

Internat'l Paper Co., 98 IBLA 52 (June 5, 1987)

Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to the Board of Land Appeals.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

The assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" does not apply to claims which did not exist at the time of publication of notice of a patent application and for which no adverse claim could have been filed.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), operates as a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim is valid under the mining laws. If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. If the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for land or apply for a patent himself.

A locator who fails to file an adverse claim against an application for patent may file a protest on the grounds that the applicant has failed to comply with the mining laws.

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment,

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

GOVERNMENT CONTESTS

Where a Native allotment application cannot be legislatively approved pursuant to sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), and there are disputed issues of material fact regarding the applicant's use and occupancy of the land, BLM will be required to initiate a Government contest so that these issues can be resolved at a hearing.

State of Alaska, 95 IBLA 196 (Jan. 14, 1987)

CONTRACT DISPUTES ACT OF 1978

ATTORNEY FEES

Substantially Justified

Where the Government has not acted arbitrarily or unreasonably in its negotiations prior to the Board's hearing on the merits of an underlying contract appeal, but facts and explanations become evident at the hearing that the Government would not ordinarily have been expected to know, which evidence ultimately entitles appellant to prevail on its contract claims, then the hearing was clearly essential to the appellant's case and appellant is not entitled to attorney

CONTRACT DISPUTES ACT OF 1978--Continued

ATTORNEY FEES--Continued

Substantially Justified--Continued

fees or costs, since the Government's position in contesting the claim prior to the hearing was substantially justified.

Stephen J. Kenney (Application for Attorney Fees), IBCA-2132-F (Oct. 8, 1987)

CONTRACTS

(See also Appeals, Claims Against the United States, Delegation of Authority, Labor, Rules of Practice--if included in this Index.)

GENERALLY

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The

CONTRACTS--Continued

GENERALLY--Continued

job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987) 94 I.D. 86

CONSTRUCTION AND OPERATION

Actions of Parties

A claim under a construction contract for diversion of a river around a construction site is denied, where the Board finds that prior to a dispute arising,

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

the parties had interpreted the contract as requiring the contractor to do the work involving the diversion for which the claim was made.

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagree on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefore, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral change order. The 101-day time extension requested by appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

A claim for the placement of sheet piling under a contract for the construction of a dam is denied, where the testimony of the project engineer that the contractor had proposed furnishing the sheet piling for its convenience is corroborated by a contemporaneous entry in the project diary and the testimony of appellant's vice president to the contrary is uncorroborated.

A claim for additional costs incurred in placing a clay seal and performing other work related to preparation of the upstream apron foundation is denied, where the Board finds that the work covered by the claim stemmed from the flouting by appellant of the specification requirement that where concrete is to be placed on any excavated surface special care shall be taken not to disturb the bottom of the excavation more than necessary and that faced with the prospect of being required to remove all of the disturbed material in the area of the upstream apron and replace the same with concrete to the planned grade at the contractor's expense, the contractor opted to accept the clay-seal

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

alternative and agreed to perform under such alternative at no additional cost to the Government.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Allowable Costs

Where a contractor appeals from a Government claim for repayment of overhead expense applied to the salaries of three individuals designated by the contractor as consultants solely for benefits accruing to the individuals, but who were in all other respects treated as employees in the contract budget and actual performance, we find the individuals to be employees whose salaries were properly included in the direct salary base for reimbursement of overhead expense.

Appeal of Northern Illinois University, IBCA-2067 (Feb. 26, 1987)

Where the Government defended against an appeal seeking additional costs for performance on the ground that the contractor had followed an unpermitted change in its accounting system in reaching the amount of the costs sought, the Board noted that a change in a contractor's accounting system is no bar to recovery unless it has a prejudicial effect on the Government and, having determined that the Government had shown no such prejudice, held that the accounting system change was no bar to recovery in this case.

Where the contracting officer, being aware that the contractor had incurred costs up to or beyond the ceiling of the contract's limitation of costs clause, nevertheless communicated his urgent desire that the contractor continue to perform, the Board held that the limitation clause had been waived and that it could not be used to bar recovery of reasonable, allowable costs above the limit incurred in performing the contract.

Appeal of Salisbury & Dietz, Inc., IBCA-2090 (Aug. 31, 1987) 94 I.D. 373

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Allowable Costs--Continued

A claim for overrun costs under a purchase order calling for the fabrication and installation of highway signs is denied when the appellant fails to show (i) that any work performed was in excess of that required by the contract; (ii) that timely notice of an impending overrun could not have been given if its accounting system had been adequate; and (iii) that the contracting officer was chargeable with constructive knowledge of the impending overrun.

Appeal of State of Alabama Highway Dept., IBCA-2362 (Dec. 10, 1987)

Changed Conditions (Differing Site Conditions)

Contractors performing work under a clearing contract were not entitled to an equitable adjustment for having encountered substantial quantities of rock outcroppings which required additional hand clearing, where a full, pre-bid site investigation would have disclosed the presence of such visible rock conditions. The contractors based their bid on partial investigations of the project area, and on statements by a Government inspector, which the Board held did not misrepresent conditions at the site. The contractors sought to excuse their failure to inspect the entire project area on the grounds that the terrain was difficult to traverse, was covered with briars, and infested with snakes. The Board concluded however, that such factors pointed to the difficulty of conducting a full-site investigation, but did not demonstrate that the area was inaccessible or impossible to inspect.

Appeal of Bo McAlister & Loyd Thompson, IBCA-2144 (Nov. 30, 1987)

Changes and Extras

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagree on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefore, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral change order. The 101-day time extension requested by appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

A claim for the costs involved in cutting and rewelding slide frames for four headgates under a contract for the construction of a dam is denied, where the cutting and rewelding performed were found to result from the contractor's choice of construction method for which it was not entitled to additional compensation.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Claims under a contract calling for cadastral survey work are denied where the appellant fails to establish it is entitled to additional compensation on the basis of mutual mistake, constructive change, or defective specifications.

Wakon Redbird & Associates, IBCA-1950 (July 30, 1987)

Contract Clauses

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract Clauses--Continued

extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

Under the Permits and Responsibilities clause of a firm, fixed-price standard construction contract, the contractor is liable for a tax imposed by an Indian tribe on a construction project where the tribe alleges that the project is within reservation boundaries and the contractor elects to pay the tax rather than contest it. A Government contracting agency is not required to determine the boundaries of the Indian reservation before soliciting bids on the project.

Regardless of the precise location of the boundary of an Indian reservation, a construction contractor under a firm, fixed-price contract is not entitled to additional compensation where an Indian tribe, after the construction had commenced, imposed a tax on the project that the contractor had not anticipated when making its bid, in circumstances where the Government in its solicitation documents had called attention to

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract Clauses--Continued

the possibility that the tax might be imposed by the tribe.

Appeal of Humphrey Construction, Inc., IBCA-2266 & 2267 (June 11, 1987) 94 I.D. 204

A Government's Motion for Summary Judgment is denied where the Board finds that determining a fair and reasonable profit under a contract terminated for the convenience of the Government involves the exercise of judgment by the contracting officer whose determinations are subject to de novo review by the Board which may sustain, modify, or overturn the decision reached by the contracting officer.

Appeal of Quality Seeding, Inc., IBCA-2297 (July 21, 1987) 94 I.D. 368

Contracting Officer

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987) 94 I.D. 86

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contracting Officer--Continued

A Government's Motion for Summary Judgment is denied where the Board finds that determining a fair and reasonable profit under a contract terminated for the convenience of the Government involves the exercise of judgment by the contracting officer whose determinations are subject to de novo review by the Board which may sustain, modify, or overturn the decision reached by the contracting officer.

Appeal of Quality Seeding, Inc., IBCA-2297 (July 21, 1987) 94 I.D. 368

Differing Site Conditions (Changed Conditions)

A contractor's claim for an equitable adjustment, due to an alleged differing site condition encountered during the pile-driving portion of a residential construction project, was denied, under both a category I and category II claim, where the Board found that the contractor failed to prove what the alleged encountered subsurface condition was. The Board held that proof of subsurface conditions cannot be shown in the abstract, but must be established in the light of geological data and other relevant and probative evidence.

Appeal of Straub Construction Co., IBCA-2291-A (Aug. 19, 1987)

Contractors performing work under a clearing contract were not entitled to an equitable adjustment for having encountered substantial quantities of rock outcroppings which required additional hand clearing, where a full, pre-bid site investigation would have disclosed the presence of such visible rock conditions. The contractors based their bid on partial investigations of the project area, and on statements by a Government inspector, which the Board held did not misrepresent conditions at the site. The contractors sought to excuse their failure to inspect the entire project area on the grounds that the terrain was difficult to traverse, was covered with briars, and infested with snakes. The Board concluded however, that such factors pointed to the difficulty of conducting a full-site investigation, but did not

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Differing Site Conditions (Changed Conditions) --Continued

demonstrate that the area was inaccessible or impossible to inspect.

Appeal of Bo McAlister & Loyd Thompson, IBCA-2144 (Nov. 30, 1987)

Drawings and Specifications

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagree on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefore, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral change order. The 101-day time extension requested by appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

Under a contract for the construction of a dam, a claim for the amount of dewatering said to have been directed in excess of contract requirements is denied where the Board finds that two of the specification provisions pertaining to the placement of concrete where water is present were directly conflicting and therefore patently ambiguous and that the failure of appellant to make inquiry of the contracting officer prior to bidding resulted in the ambiguous contract provisions being interpreted against appellant.

A claim for the costs involved in cutting and rewelding slide frames for four headgates under a contract for the construction of a dam is denied, where the cutting and rewelding performed were found to result from the contractor's choice of construction

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings and Specifications--Continued

method for which it was not entitled to additional compensation.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Claims under a contract calling for cadastral survey work are denied where the appellant fails to establish it is entitled to additional compensation on the basis of mutual mistake, constructive change, or defective specifications.

Wakon Redbird & Associates, IBCA-1950 (July 30, 1987)

A contractor terminated for default was not entitled to recover additional excavation/backfill costs expended in attempting to comply with alleged defective specifications, where the evidence showed that the contractor made an inaccurate estimate of the amount of backfill required for the project, and failed to establish a cause-and-effect relationship between the alleged defective specifications and its excess costs.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Duty to Inquire

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Duty to Inquire--Continued

extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

Under a contract for the construction of a dam, a claim for the amount of dewatering said to have been directed in excess of contract requirements is denied where the Board finds that two of the specification provisions pertaining to the placement of concrete where water is present were directly conflicting and therefore patently ambiguous and that the failure of appellant to make inquiry of the contracting officer prior to bidding resulted in the ambiguous contract provisions being interpreted against appellant.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Estimated Quantities

A contractor terminated for default was not entitled to recover additional excavation/backfill costs expended in attempting to comply with alleged defective specifications, where the evidence showed that the contractor made an inaccurate estimate of the amount of backfill required for the project, and failed to establish a cause-and-effect relationship between the alleged defective specifications and its excess costs.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

General Rules of Construction

A contractor's request for an equitable adjustment for excess costs associated with the purchase of pipe under a construction contract was denied, where the evidence showed that the contractor's interpretation of the phrase "[i]nstall supply and drain piping using Government-furnished . . . and contractor furnished pipe as required . . ." was unreasonable, and did not justify the contractor's failure to make additional allowances for pipe in its bid. The Board concluded that a reasonable and prudent bidder would not interpret this and other contract provisions as meaning that all piping for the project would be furnished by the Government. Rather, the Board found that the only reasonable interpretation of the contract language, taken as a whole, would put the contractor on notice that it would be his responsibility to provide some of the piping for the project.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Government-furnished Property

A contractor's request for an equitable adjustment for excess costs associated with the purchase of pipe under a construction contract was denied, where the evidence showed that the contractor's interpretation of the phrase "[i]nstall supply and drain piping using Government-furnished . . . and contractor furnished pipe as required . . ." was unreasonable, and did not

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Government-furnished Property--Continued

justify the contractor's failure to make additional allowances for pipe in its bid. The Board concluded that a reasonable and prudent bidder would not interpret this and other contract provisions as meaning that all piping for the project would be furnished by the Government. Rather, the Board found that the only reasonable interpretation of the contract language, taken as a whole, would put the contractor on notice that it would be his responsibility to provide some of the piping for the project.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Intent of Parties

A claim under a construction contract for diversion of a river around a construction site is denied, where the Board finds that prior to a dispute arising, the parties had interpreted the contract as requiring the contractor to do the work involving the diversion for which the claim was made.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Labor Laws

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Notices

A claim for overrun costs under a purchase order calling for the fabrication and installation of highway signs is denied when the appellant fails to show (i) that any work performed was in excess of that required by the contract; (ii) that timely notice of an impending overrun could not have been given if its accounting system had been adequate; and (iii) that the contracting officer was chargeable with constructive knowledge of the impending overrun.

Appeal of State of Alabama Highway Dept., IBCA-2362 (Dec. 10, 1987)

Payments

A dispute between the parties as to whether appellant has been paid the unit prices shown in a unilateral change order for the excavation of timber cribbing and the placement of compacted backfill is resolved by the Board finding that payment is an affirmative defense and that the Government has failed to carry its burden of showing that payment of the disputed sums were in fact made in this case.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

A contractor's claim for amounts allegedly owed under a progress payment, which was suspended due to unsatisfactory performance of the contract work was denied, where the evidence showed that such work was never accepted by the Government, and that the value of the work performed by the contractor was far outweighed by the costs of reprocurement to replace and repair the deficiencies of the contractor's performance. The Government was found to have received no benefit from appellant's efforts, and was therefore not required to pay for any labor and materials expended by the contractor in its unsuccessful attempt to complete the contract.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Waiver and Estoppel

Upon finding that the contracting officer issued a change order granting a 27-day extension of time, which specifically included 3 days of delay caused by the cleaning up of rainwater damage resulting from roof leaks, and that the contracting officer based his change order on a determination that the contractor's request for the days of delay was "fair and reasonable," the Board holds that the Government waived its right to terminate the contract on the ground that the contractor breached the contract by not providing adequate protection to the building from rain damage during a reroofing project.

Appeal of James W. Sprayberry Construction, IBCA-2130 (Mar. 6, 1987) 94 I.D. 45

CONTRACT DISPUTES ACT OF 1978

Attorney Fees

Where the Government has not acted arbitrarily or unreasonably in its negotiations prior to the Board's hearing on the merits of an underlying contract appeal, but facts and explanations become evident at the hearing that the Government would not ordinarily have been expected to know, which evidence ultimately entitles appellant to prevail on its contract claims, then the hearing was clearly essential to the appellant's case and appellant is not entitled to attorney fees or costs, since the Government's position in contesting the claim prior to the hearing was substantially justified.

Stephen J. Kenney (Application for Attorney Fees), IBCA-2132-F (Oct. 8, 1987)

Interest

On the basis of the legislative history of the Contract Disputes Act and controlling case law, the Board rejects the notion that interest is payable on contractor claims only when an underlying dispute exists, but concludes that something more than a simple invoice and the passage of time is required for interest to accrue on contract obligations. The claim

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Interest--Continued

must be a demand for payment in a specific amount, and the CO must be given an adequate basis for making a decision.

The Board finds no fault with the definition of "claim" in the Disputes clause of the Federal Acquisition Regulations, since it is consistent with the dictionary definition of the word and thus can be presumed to be in accord with the intent of the Contract Disputes Act. However, because the FAR explanatory material and previous versions of the regulation have caused considerable confusion, the Board adopts the definition of "claim" recently set forth by the Federal Circuit Appeals Court in Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586 (Fed. Cir. 1987).

Interest, on contractor claims ultimately allowed, accrues from the date, subsequent to the date of the initial billing, when the CO receives a clear and unequivocal demand in writing for a specific amount that sets forth an adequate basis for the amount sought, provided that the CO has previously had a reasonable opportunity to act on the initial billing.

Appeal of A & J Construction Co., Inc., IBCA-2269 (June 29, 1987) 94 I.D. 211

Jurisdiction

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with

CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

DISPUTES AND REMEDIES

Generally

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Generally--Continued

in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Generally--Continued

On the basis of the legislative history of the Contract Disputes Act and controlling case law, the Board rejects the notion that interest is payable on contractor claims only when an underlying dispute exists, but concludes that something more than a simple invoice and the passage of time is required for interest to accrue on contract obligations. The claim must be a demand for payment in a specific amount, and the CO must be given an adequate basis for making a decision.

The Board finds no fault with the definition of "claim" in the Disputes clause of the Federal Acquisition Regulations, since it is consistent with the dictionary definition of the word and thus can be presumed to be in accord with the intent of the Contract Disputes Act. However, because the FAR explanatory material and previous versions of the regulation have caused considerable confusion, the Board adopts the definition of "claim" recently set forth by the Federal Circuit Appeals Court in Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586 (Fed. Cir. 1987).

Interest, on contractor claims ultimately allowed, accrues from the date, subsequent to the date of the initial billing, when the CO receives a clear and unequivocal demand in writing for a specific amount that sets forth an adequate basis for the amount sought, provided that the CO has previously had a reasonable opportunity to act on the initial billing.

Appeal of A & J Construction Co., Inc., IBCA-2269 (June 29, 1987) 94 I.D. 211

Appeals

A Government counterclaim is found not to be before the Board for decision where the failure of the contracting officer to advise the contractor of the Government claims and afford the contractor an opportunity to respond to them before proceeding with the issuance of his decision was considered to deprive the decision of finality.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof

Upon finding that the contractor's refusal to proceed was a conditional, rather than an unconditional, manifestation of nonperformance, when the contractor remained at the site awaiting clarification or direction on how to proceed under technical specifications, the Board holds that the Government failed to sustain its burden of proving alleged abandonment by not proving words or conduct on the part of the contractor manifesting a positive, unequivocal, and unconditional intent not to perform the contract in any event or at any time.

Appeal of James W. Sprayberry Construction, IBCA-2130
(Mar. 6, 1987) 94 I.D. 45

Where, in a reroofing project, the Board found that the contractor's measurements and calculations were corroborated and more meticulously done than were the Government's, the Board held that the contractor sustained its burden of proof by a preponderence of the evidence with respect to the claims involving reshingling and the application of a foam roofing system.

Appeal of Singleton Contracting Corp., IBCA-1838
(June 29, 1987)

In denying a request by appellant that the testimony of a project engineer on a Government project for the construction of a dam be disregarded as in conflict with an entry in the project diary made by an inspector, the Board noted that there appeared to be a reasonable basis for reconciling the purportedly conflicting evidence but that in any event there was an obligation to confront the project engineer with the diary entry at the hearing, if, after the record was closed, appellant was to rely upon the diary entry to discredit the testimony given by the project engineer.

Serious deficiencies in the records maintained by appellant are found by the Board where: (i) amounts paid to personnel involved in general supervision were charged to direct costs rather than to overhead in accordance with generally accepted accounting principles; (ii) some of the time cards relied upon to

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

support claimed labor costs were neither signed nor initialed by anyone in a supervisory capacity; (iii) there is no indication that the daily construction progress reports of the contract were kept in bound volumes; (iv) the records of the contractor failed to systematically distinguish between work required by the contract and claim work; and (v) overhead and profit are claimed on equipment costs even though presumably those items have been included in the equipment rates used by appellant in computing the amounts of the various claims. The Board also finds (i) that the entries of the project engineer in the project diary were recorded in bound volumes; (ii) that such diaries were superior in both content and form to the daily construction reports of the contractor; and (iii) that the records maintained by the project engineer in other areas (including those pertaining to quantity measurements) were superior to comparable records maintained by appellant.

In an appeal involving the construction of a dam, a claim for the cost of modifying and repairing a return channel is denied, where the evidence shows that all of the costs involved would have been unnecessary if the return channel had been properly constructed in the first place.

A dispute between the parties as to whether appellant has been paid the unit prices shown in a unilateral change order for the excavation of timber cribbing and the placement of compacted backfill is resolved by the Board finding that payment is an affirmative defense and that the Government has failed to carry its burden of showing that payment of the disputed sums were in fact made in this case.

A claim for the placement of sheet piling under a contract for the construction of a dam is denied, where the testimony of the project engineer that the contractor had proposed furnishing the sheet piling for its convenience is corroborated by a contemporaneous entry in the project diary and the testimony of appellant's vice president to the contrary is uncorroborated.

A claim for additional costs incurred in placing a clay seal and performing other work related to preparation of the upstream apron foundation is denied, where the Board finds that the work covered by the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

claim stemmed from the flouting by appellant of the specification requirement that where concrete is to be placed on any excavated surface special care shall be taken not to disturb the bottom of the excavation more than necessary and that faced with the prospect of being required to remove all of the disturbed material in the area of the upstream apron and replace the same with concrete to the planned grade at the contractor's expense, the contractor opted to accept the clay-seal alternative and agreed to perform under such alternative at no additional cost to the Government.

Appellant's monetary claim for winter heat and cover and a related claim for a time extension are denied where the principal contention advanced by appellant is that the claim resulted from the cumulative effect of delays attributable to the Government which pushed the actual construction work into the cold weather months but as to which the Board finds that the delays are concurrent and that the appellant has failed to show the delays attributed to the Government are apart from the delays for which the contractor was responsible.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

A contractor's claim for an equitable adjustment, due to an alleged differing site condition encountered during the pile-driving portion of a residential construction project, was denied, under both a category I and category II claim, where the Board found that the contractor failed to prove what the alleged encountered subsurface condition was. The Board held that proof of subsurface conditions cannot be shown in the abstract, but must be established in the light of geological data and other relevant and probative evidence.

Appeal of Straub Construction Co., IBCA-2291-A (Aug. 19, 1987)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

Where, under a requirement, fixed-price contract for photographic materials and services to be furnished by the contractor to the Government, the contractor failed to deliver the first six purchase orders, the Board denied claimed entitlement to a conversion of a termination for default to a termination for convenience, since the contractor failed to produce any credible evidence in support of its allegations, and since the principal assertion of the right to such conversion, that the supplier for the contractor failed to perform, does not, as a matter of law, constitute excusable cause for delay.

Appeal of Logan Cartographic Services, IBCA-2287A (Aug. 26, 1987)

A contract for construction of a fish hatchery nursery facility was properly terminated for default where the evidence showed that the contractor's work contained numerous performance deficiencies; that the contractor failed to make required submittals; and failed to remedy such deficiencies within a reasonable cure period. The record contained no basis for concluding that the contractor's failure to perform was excusable. Under such circumstances, the Government was within its rights to terminate the contract for default.

A contractor's request for an equitable adjustment for additional contract time due to alleged unusually severe weather was denied, where the contractor failed to prove that rainfall at the project site was unusually heavy for the time and place at which it occurred, or that there was some nexus between the weather conditions encountered and the contractor's inability to perform in timely fashion.

A contractor's claim that it was entitled to damages due to the Government's alleged breach of contract, was denied where the evidence failed to support the contractor's allegations that the Government administered the contract in an arbitrary and capricious manner, and failed to allow the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

contractor an adequate opportunity to cure its performance deficiencies.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Where a rock-quarry blasting contractor claims equipment damage and work delays caused by the detonation of hidden explosives, and proves by credible testimony that at least some hidden explosives must have been left at the site by a previous contractor; but where the contractor's log makes only minimum mention of the secondary blast that caused the damage, and the contractor has not given the contracting officer timely written notice of the mishap or of the differing site condition that allegedly resulted, and can offer no reasonable basis other than the total-cost approach for establishing its resulting additional costs, the Board limits the amount of its award to the amount of loss and damage claimed by the contractor in its initial submission to the contracting officer.

Appeal of Marlene Deen d.b.a. M. D. Activities, IBCA-2113 (Dec. 7, 1987)

Damages

Generally

A contractor is entitled to recover all of the reasonable costs that proximately result from Government conduct where that conduct delays and disrupts the performance of the contract over a lengthy period of time, where the effect of the delay and disruption is to force the contractor into idleness over that period, and where the motivation for that conduct is a perception, without any foundation in the contract, that the contractor has design responsibility for the project.

Appeal of Redondo Electric, IBCA-2020 (June 29, 1987)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Generally--Continued

A contractor's claim that it was entitled to damages due to the Government's alleged breach of contract, was denied where the evidence failed to support the contractor's allegations that the Government administered the contract in an arbitrary and capricious manner, and failed to allow the contractor an adequate opportunity to cure its performance deficiencies.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Where a rock-quarry blasting contractor claims equipment damage and work delays caused by the detonation of hidden explosives, and proves by credible testimony that at least some hidden explosives must have been left at the site by a previous contractor; but where the contractor's log makes only minimum mention of the secondary blast that caused the damage, and the contractor has not given the contracting officer timely written notice of the mishap or of the differing site condition that allegedly resulted, and can offer no reasonable basis other than the total-cost approach for establishing its resulting additional costs, the Board limits the amount of its award to the amount of loss and damage claimed by the contractor in its initial submission to the contracting officer.

Appeal of Marlene Deen d.b.a. M. D. Activities, IBCA-2113 (Dec. 7, 1987)

Liquidated Damages

The assessment of $100 per day liquidated damages against a contractor terminated for default was found to be proper, where the evidence showed that such damages were computed in good faith, and were not inherently unreasonable or disproportionate to the

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Liquidated Damages--Continued

actual damages suffered by the Government upon the contractor's default.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Measurement

The assessment of $100 per day liquidated damages against a contractor terminated for default was found to be proper, where the evidence showed that such damages were computed in good faith, and were not inherently unreasonable or disproportionate to the actual damages suffered by the Government upon the contractor's default.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Equitable Adjustments

Serious deficiencies in the records maintained by appellant are found by the Board where: (i) amounts paid to personnel involved in general supervision were charged to direct costs rather than to overhead in accordance with generally accepted accounting principles; (ii) some of the time cards relied upon to support claimed labor costs were neither signed nor initialed by anyone in a supervisory capacity; (iii) there is no indication that the daily construction progress reports of the contract were kept in bound volumes; (iv) the records of the contractor failed to systematically distinguish between work required by the contract and claim work; and (v) overhead and profit are claimed on equipment costs even though presumably those items have been included in the equipment rates used by appellant in computing the amounts of the various claims. The Board also finds (i) that the entries of the project engineer in the project diary were recorded in bound volumes; (ii) that such diaries were superior in both content and form to the daily construction reports of the contractor; and (iii) that the records maintained by

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

the project engineer in other areas (including those pertaining to quantity measurements) were superior to comparable records maintained by appellant.

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagree on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefore, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral change order. The 101-day time extension requested by appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

Appellant's monetary claim for winter heat and cover and a related claim for a time extension are denied where the principal contention advanced by appellant is that the claim resulted from the cumulative effect of delays attributable to the Government which pushed the actual construction work into the cold weather months but as to which the Board finds that the delays are concurrent and that the appellant has failed to show the delays attributed to the Government are apart from the delays for which the contractor was responsible.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

A contractor's claim for amounts allegedly owed under a progress payment, which was suspended due to unsatisfactory performance of the contract work was denied, where the evidence showed that such work was never accepted by the Government, and that the value of the work performed by the contractor was far outweighed by the costs of reprocurement to replace and repair the deficiencies of the contractor's performance. The Government was found to have received no

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

benefit from appellant's efforts, and was therefore not required to pay for any labor and materials expended by the contractor in its unsuccessful attempt to complete the contract.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Contractors performing work under a clearing contract were not entitled to an equitable adjustment for having encountered substantial quantities of rock outcroppings which required additional hand clearing, where a full, pre-bid site investigation would have disclosed the presence of such visible rock conditions. The contractors based their bid on partial investigations of the project area, and on statements by a Government inspector, which the Board held did not misrepresent conditions at the site. The contractors sought to excuse their failure to inspect the entire project area on the grounds that the terrain was difficult to traverse, was covered with briars, and infested with snakes. The Board concluded however, that such factors pointed to the difficulty of conducting a full-site investigation, but did not demonstrate that the area was inaccessible or impossible to inspect.

Appeal of Bo McAlister & Loyd Thompson, IBCA-2144 (Nov. 30, 1987)

Jurisdiction

A Government counterclaim is found not to be before the Board for decision where the failure of the contracting officer to advise the contractor of the Government claims and afford the contractor an opportunity to respond to them before proceeding with the issuance of his decision was considered to deprive the decision of finality.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Substantial Evidence

Where a rock-quarry blasting contractor claims equipment damage and work delays caused by the detonation of hidden explosives, and proves by credible testimony that at least some hidden explosives must have been left at the site by a previous contractor; but where the contractor's log makes only minimum mention of the secondary blast that caused the damage, and the contractor has not given the contracting officer timely written notice of the mishap or of the differing site condition that allegedly resulted, and can offer no reasonable basis other than the total-cost approach for establishing its resulting additional costs, the Board limits the amount of its award to the amount of loss and damage claimed by the contractor in its initial submission to the contracting officer.

Appeal of Marlene Deen d.b.a. M. D. Activities, IBCA-2113 (Dec. 7, 1987)

Termination for Convenience

A Government's Motion for Summary Judgment is denied where the Board finds that determining a fair and reasonable profit under a contract terminated for the convenience of the Government involves the exercise of judgment by the contracting officer whose determinations are subject to de novo review by the Board which may sustain, modify, or overturn the decision reached by the contracting officer.

Appeal of Quality Seeding, Inc., IBCA-2297 (July 21, 1987) 94 I.D. 368

Where a prolonged period of unavailability of a contractor-furnished airplane, the subject of the contract, was the basis for a default termination and it was shown that the cause of that portion of the period which prompted the contracting officer to issue the termination notice was Government conduct and was beyond the control and without the fault and negligence of the contractor, the Board finds the delay relied upon for the default to be excusable with the result

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Termination for Convenience--Continued

that the default termination is converted into a termination for the convenience of the Government.

Appeal of Troy Air, Inc., IBCA-2238 (Nov. 3, 1987)
94 I.D. 416

Termination for Default

Generally

The Board holds a termination for default improper, as coming within the defective specifications or right to await clarification exception to the duty to proceed rule, upon finding that despite his many requests to do so, the Government project architect and contracting officer refused to clarify the technical method to be employed in installing roofing materials in order to comply with the specifications.

Appeal of James W. Sprayberry Construction, IBCA-2130 (Mar. 6, 1987) 94 I.D. 45

A tree-planting contract was properly terminated for default, where as of the effective date of termination, the contractor had completed only 8.7 percent of the contract work, while having used 53.3 percent of the contract performance period. The contractor's lack of diligence indicated that the Government could not be assured of timely completion of the contract, despite its repeated warnings to the contractor about its lack of progress.

Appeal of Arthur L. Cruz, d.b.a. Cruz & Associates, IBCA-2098 (Sept. 10, 1987)

Where a contractor timely appeals a default termination by the Government and the Government subsequently assesses its excess reprocurement costs against the contractor, the Board decides, in light of the Fulford doctrine, that the entire matter has already been put before the Board by the contractor's original appeal, and that a second appeal is not

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Termination for Default--Continued

Generally--Continued

necessary for the contractor to challenge the contracting officer's assessment of excess reprocurement costs, provided that the contractor expressly rebuts the CO's excess reprocurement-cost determination by evidence timely presented to the Board before the closing of the record in the case.

Appeal of Tom Warr, IBCA-2360 (Oct. 14, 1987)
94 I.D. 413

A contract for construction of a fish hatchery nursery facility was properly terminated for default where the evidence showed that the contractor's work contained numerous performance deficiencies; that the contractor failed to make required submittals; and failed to remedy such deficiencies within a reasonable cure period. The record contained no basis for concluding that the contractor's failure to perform was excusable. Under such circumstances, the Government was within its rights to terminate the contract for default.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Where a prolonged period of unavailability of a contractor-furnished airplane, the subject of the contract, was the basis for a default termination and it was shown that the cause of that portion of the period which prompted the contracting officer to issue the termination notice was Government conduct and was beyond the control and without the fault and negligence of the contractor, the Board finds the delay relied upon for the default to be excusable with the result that the default termination is converted into a termination for the convenience of the Government.

Appeal of Troy Air, Inc., IBCA-2238 (Nov. 3, 1987)
94 I.D. 416

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Termination for Default--Continued

Excess Costs

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987) 94 I.D. 86

Where a contractor timely appeals a default termination by the Government and the Government subsequently assesses its excess reprocurement costs against the contractor, the Board decides, in light of the Fulford doctrine, that the entire matter has already been put before the Board by the contractor's original appeal, and that a second appeal is not necessary for the contractor to challenge the contracting officer's assessment of excess reprocurement costs, provided that the contractor expressly rebuts the CO's excess reprocurement-cost determination by evidence timely presented to the Board before the closing of the record in the case.

Appeal of Tom Warr, IBCA-2360 (Oct. 14, 1987) 94 I.D. 413

A contractor terminated for default was not entitled to recover additional excavation/backfill costs expended in attempting to comply with alleged defective specifications, where the evidence showed that the contractor made an inaccurate estimate of the amount of backfill required for the project, and failed

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Termination for Default--Continued

Excess Costs--Continued

to establish a cause-and-effect relationship between the alleged defective specifications and its excess costs.

A contractor's request for an equitable adjustment for excess costs associated with the purchase of pipe under a construction contract was denied, where the evidence showed that the contractor's interpretation of the phrase "[i]nstall supply and drain piping using Government-furnished . . . and contractor furnished pipe as required . . ." was unreasonable, and did not justify the contractor's failure to make additional allowances for pipe in its bid. The Board concluded that a reasonable and prudent bidder would not interpret this and other contract provisions as meaning that all piping for the project would be furnished by the Government. Rather, the Board found that the only reasonable interpretation of the contract language, taken as a whole, would put the contractor on notice that it would be his responsibility to provide some of the piping for the project.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

FEDERAL PROCUREMENT REGULATIONS

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with

CONTRACTS--Continued

FEDERAL PROCUREMENT REGULATIONS--Continued

arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

The Board finds no fault with the definition of "claim" in the Disputes clause of the Federal Acquisition Regulations, since it is consistent with the dictionary definition of the word and thus can be presumed to be in accord with the intent of the Contract Disputes Act. However, because the FAR explanatory material and previous versions of the regulation have caused considerable confusion, the Board adopts the definition of "claim" recently set forth by the Federal Circuit Appeals Court in Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586 (Fed. Cir. 1987).

Appeal of A & J Construction Co., Inc., IBCA-2269 (June 29, 1987) 94 I.D. 211

CONTRACTS--Continued

FORMATION AND VALIDITY

Generally

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987) 94 I.D. 86

Bid Award

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987) 94 I.D. 86

Construction Contracts

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters

in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Construction Contracts--Continued

Serious deficiencies in the records maintained by appellant are found by the Board where: (i) amounts paid to personnel involved in general supervision were charged to direct costs rather than to overhead in accordance with generally accepted accounting principles; (ii) some of the time cards relied upon to support claimed labor costs were neither signed nor initialed by anyone in a supervisory capacity; (iii) there is no indication that the daily construction progress reports of the contract were kept in bound volumes; (iv) the records of the contractor failed to systematically distinguish between work required by the contract and claim work; and (v) overhead and profit are claimed on equipment costs even though presumably those items have been included in the equipment rates used by appellant in computing the amounts of the various claims. The Board also finds (i) that the entries of the project engineer in the project diary were recorded in bound volumes; (ii) that such diaries were superior in both content and form to the daily construction reports of the contractor; and (iii) that the records maintained by the project engineer in other areas (including those pertaining to quantity measurements) were superior to comparable records maintained by appellant.

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagree on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefore, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral change order. The 101-day time extension requested by appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

Under a contract for the construction of a dam, a claim for the amount of dewatering said to have been directed in excess of contract requirements is denied where the Board finds that two of the specification

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Construction Contracts--Continued

provisions pertaining to the placement of concrete where water is present were directly conflicting and therefore patently ambiguous and that the failure of appellant to make inquiry of the contracting officer prior to bidding resulted in the ambiguous contract provisions being interpreted against appellant.

A claim for additional costs incurred in placing a clay seal and performing other work related to preparation of the upstream apron foundation is denied, where the Board finds that the work covered by the claim stemmed from the flouting by appellant of the specification requirement that where concrete is to be placed on any excavated surface special care shall be taken not to disturb the bottom of the excavation more than necessary and that faced with the prospect of being required to remove all of the disturbed material in the area of the upstream apron and replace the same with concrete to the planned grade at the contractor's expense, the contractor opted to accept the clay-seal alternative and agreed to perform under such alternative at no additional cost to the Government.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Fixed-price Contracts

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Fixed-price Contracts--Continued

which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

Under the Permits and Responsibilities clause of a firm, fixed-price standard construction contract, the contractor is liable for a tax imposed by an Indian tribe on a construction project where the tribe alleges that the project is within reservation boundaries and the contractor elects to pay the tax rather than contest it. A Government contracting agency is not required to determine the boundaries of the Indian reservation before soliciting bids on the project.

Regardless of the precise location of the boundary of an Indian reservation, a construction contractor under a firm, fixed-price contract is not entitled to additional compensation where an Indian tribe, after

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Fixed-price Contracts--Continued

the construction had commenced, imposed a tax on the project that the contractor had not anticipated when making its bid, in circumstances where the Government in its solicitation documents had called attention to the possibility that the tax might be imposed by the tribe.

Appeal of Humphrey Construction, Inc., IBCA-2266 & 2267 (June 11, 1987) 94 I.D. 204

Governing Law

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Governing Law--Continued

maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

Mistakes

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The

CONTRACTS--Continued

FORMATION AND VALIDITY--Continued

Mistakes--Continued

job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

Claims under a contract calling for cadastral survey work are denied where the appellant fails to establish it is entitled to additional compensation on the basis of mutual mistake, constructive change, or defective specifications.

Wakon Redbird & Associates, IBCA-1950 (July 30, 1987)

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Generally

An Indian tribe dealing with the Government under the Indian Self-Determination and Education Assistance Act is not required to be, or to become, expert in the Bureau of Indian Affairs' complex budgetary scheme. It is BIA's responsibility to see that its administrative requirements are satisfied, and it cannot properly shift that responsibility to the Indian contractor.

BIA regulations implementing the Indian Self-Determination and Education Assistance Act provide that proposed contract modifications by an Indian contractor are to be submitted to the contracting officer for

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

approval. If he approves them, the contractor is entitled to rely on that approval, even if BIA later decides that the approval was improper, provided the approval was not clearly contrary to law.

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and where BIA's own contracting officer failed to recognize the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedure in 25 CFR Part 271.

Sec. 106(h) of the Indian Self-Determination Act, 25 U.S.C. § 450j(h) (1982), does not preclude the use of program funds to pay costs incurred by the Bureau of Indian Affairs in monitoring and providing technical assistance for a contract under the Act.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987) 94 I.D. 120

On reconsideration, the Board concludes that since the contract before it contains no termination for convenience clause and since the Government did not establish that it met the requirements of any other clause permitting modification or termination of the contract, the requirements of the contract were not met, and the contractor is entitled to recover in full

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

the expenses it incurred in performing its work under the contract.

Appeal of Navajo Community College (On Reconsideration), IBCA-1834 (May 8, 1987)

Burden of Proof

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and where BIA's own contracting officer failed to recognize the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

On reconsideration, the Board concludes that since the contract before it contains no termination for convenience clause and since the Government did not establish that it met the requirements of any other clause permitting modification or termination of the contract, the requirements of the contract were not met, and the contractor is entitled to recover in full the expenses it incurred in performing its work under the contract.

Appeal of Navajo Community College (On Reconsideration), IBCA-1834 (May 8, 1987)

Contracting Officer

BIA regulations implementing the Indian Self-Determination and Education Assistance Act provide that proposed contract modifications by an Indian contractor are to be submitted to the contracting officer for approval. If he approves them, the contractor is entitled to rely on that approval, even if BIA later

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Contracting Officer--Continued

decides that the approval was improper, provided the approval was not clearly contrary to law.

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and where BIA's own contracting officer failed to recognize the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

Governing Law

An Indian tribe dealing with the Government under the Indian Self-Determination and Education Assistance Act is not required to be, or to become, expert in the Bureau of Indian Affairs' complex budgetary scheme. It is BIA's responsibility to see that its administrative requirements are satisfied, and it cannot properly shift that responsibility to the Indian contractor.

BIA regulations implementing the Indian Self-Determination and Education Assistance Act provide that proposed contract modifications by an Indian contractor are to be submitted to the contracting officer for approval. If he approves them, the contractor is entitled to rely on that approval, even if BIA later decides that the approval was improper, provided the approval was not clearly contrary to law.

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and where BIA's own contracting officer failed to recognize

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Governing Law--Continued

the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

On reconsideration, the Board concludes that since the contract before it contains no termination for convenience clause and since the Government did not establish that it met the requirements of any other clause permitting modification or termination of the contract, the requirements of the contract were not met, and the contractor is entitled to recover in full the expenses it incurred in performing its work under the contract.

Appeal of Navajo Community College (On Reconsideration), IBCA-1834 (May 8, 1987)

Modification of Contracts

An Indian tribe dealing with the Government under the Indian Self-Determination and Education Assistance Act is not required to be, or to become, expert in the Bureau of Indian Affairs' complex budgetary scheme. It is BIA's responsibility to see that its administrative requirements are satisfied, and it cannot properly shift that responsibility to the Indian contractor.

BIA regulations implementing the Indian Self-Determination and Education Assistance Act provide that proposed contract modifications by an Indian contractor are to be submitted to the contracting officer for approval. If he approves them, the contractor is entitled to rely on that approval, even if BIA later decides that the approval was improper, provided the approval was not clearly contrary to law.

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Modification of Contracts--Continued

where BIA's own contracting officer failed to recognize the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

On reconsideration, the Board concludes that since the contract before it contains no termination for convenience clause and since the Government did not establish that it met the requirements of any other clause permitting modification or termination of the contract, the requirements of the contract were not met, and the contractor is entitled to recover in full the expenses it incurred in performing its work under the contract.

Appeal of Navajo Community College (On Reconsideration), IBCA-1834 (May 8, 1987)

Regulations

An Indian tribe dealing with the Government under the Indian Self-Determination and Education Assistance Act is not required to be, or to become, expert in the Bureau of Indian Affairs' complex budgetary scheme. It is BIA's responsibility to see that its administrative requirements are satisfied, and it cannot properly shift that responsibility to the Indian contractor.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

On reconsideration, the Board concludes that since the contract before it contains no termination for convenience clause and since the Government did not establish that it met the requirements of any other clause permitting modification or termination of the contract, the requirements of the contract were not met, and the contractor is entitled to recover in full

CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Regulations--Continued

the expenses it incurred in performing its work under the contract.

Appeal of Navajo Community College (On Reconsideration), IBCA-1834 (May 8, 1987)

PERFORMANCE OR DEFAULT

Acceptance of Performance

A contractor's claim for amounts allegedly owed under a progress payment, which was suspended due to unsatisfactory performance of the contract work was denied, where the evidence showed that such work was never accepted by the Government, and that the value of the work performed by the contractor was far outweighed by the costs of reprocurement to replace and repair the deficiencies of the contractor's performance. The Government was found to have received no benefit from appellant's efforts, and was therefore not required to pay for any labor and materials expended by the contractor in its unsuccessful attempt to complete the contract.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Breach

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Breach--Continued

excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987) 94 I.D. 86

A contractor's claim that it was entitled to damages due to the Government's alleged breach of contract, was denied where the evidence failed to support the contractor's allegations that the Government administered the contract in an arbitrary and capricious manner, and failed to allow the contractor an adequate opportunity to cure its performance deficiencies.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Compensable Delays

Appellant's monetary claim for winter heat and cover and a related claim for a time extension are denied where the principal contention advanced by appellant is that the claim resulted from the cumulative effect of delays attributable to the Government which pushed the actual construction work into the cold weather months but as to which the Board finds that the delays are concurrent and that the appellant has failed to show the delays attributed to the Government are apart from the delays for which the contractor was responsible.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Excusable Delays

Where the Government had specified a sole-source brand, and an off-standard tint, of top coating for the application of a foam roofing system, and the contractor's order for extra top coating, required because of Government underestimates, was delayed by the manufacturer and not controlable by the contractor,

CONTRACTS--Continued

PERFORMANCE OR DEFAULT--Continued

Excusable Delays--Continued

the Board held such delay excusable and determined the contractor entitled to a return of liquidated damages for 50 days. The Board also allowed 10.062 days of delay for the extra time required to reshingle and apply foam roofing for square footage over and above the Government's estimates for such items.

Appeal of Singleton Contracting Corp., IBCA-1838 (June 29, 1987)

Where, under a requirement, fixed-price contract for photographic materials and services to be furnished by the contractor to the Government, the contractor failed to deliver the first six purchase orders, the Board denied claimed entitlement to a conversion of a termination for default to a termination for convenience, since the contractor failed to produce any credible evidence in support of its allegations, and since the principal assertion of the right to such conversion, that the supplier for the contractor failed to perform, does not, as a matter of law, constitute excusable cause for delay.

Appeal of Logan Cartographic Services, IBCA-2287A (Aug. 26, 1987)

A contractor's request for an equitable adjustment for additional contract time due to alleged unusually severe weather was denied, where the contractor failed to prove that rainfall at the project site was unusually heavy for the time and place at which it occurred, or that there was some nexus between the weather conditions encountered and the contractor's inability to perform in timely fashion.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

CONVEYANCES

GENERALLY

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuangaruak, Mollie Itta, Wilber Ahtuangaruak, 97 IBLA 261 (May 13, 1987)

CONVEYANCES--Continued

GENERALLY--Continued

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

COURTS

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment,

COURTS--Continued

there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

DELEGATION OF AUTHORITY
(See also Administrative Authority, Contracts--if included in this Index.)

A presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

J. R. Holcomb Oil, 96 IBLA 35 (Feb. 27, 1987)

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

DESERT LAND ENTRY

ANNUAL PROOF

A desert land entry is properly cancelled when the entryman fails to submit annual proof showing the requisite improvement of the entry during the first year of the life of the entry.

Fineas G. Hughbanks, 97 IBLA 250 (May 13, 1987)

APPLICATIONS

In the absence of favorable action upon a petition to designate the land as suitable for desert land entry, an application for a desert land entry will not be considered a valid existing right excepted from a subsequent withdrawal order, and the application must be rejected by BLM, regardless of any challenge to the propriety and efficacy of the subsequent withdrawal.

Richard S. Gregory, 96 IBLA 256 (Mar. 25, 1987)

BLM may properly reject a desert land entry application where, prior to classification of the lands sought and prior to the entry being allowed, the lands have been withdrawn by a public land order as part of the Snake River Birds of Prey Area.

Diane M. Jensen, Odell M. Smith, Jr., 97 IBLA 23 (Apr. 23, 1987)

Byron V. Anderson, 97 IBLA 105 (Apr. 29, 1987)

The Bureau of Land Management properly rejects a desert land application when the applicant proposes to irrigate his entry from underground water sources, but indicates on the face of the application that he has not taken appropriate steps, as far as then possible, toward the acquisition of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portions of the land described in the application.

A ruling by BLM that the jojoba plant does not meet the requirements of the desert land entry laws will not support rejection of a desert land entry application where the record does not indicate that

APPLICATIONS--Continued

BLM analyzed data submitted by the applicant showing the economic feasibility of the commercial cultivation of the jojoba plant.

Wesley A. Painter, 98 IBLA 69 (June 9, 1987)

An application for a desert land entry is properly rejected where the lands at issue were previously classified as suitable for desert land entry but no entry was allowed under the application prior to withdrawal of the lands from entry under the Desert Land Act.

Gerald W. Marlin et al., 98 IBLA 128 (June 19, 1987)

CANCELLATION

A desert land entry is properly cancelled when the entryman fails to submit annual proof showing the requisite improvement of the entry during the first year of the life of the entry.

Fineas G. Hughbanks, 97 IBLA 250 (May 13, 1987)

CLASSIFICATION

An application for a desert land entry is properly rejected where the lands at issue were previously classified as suitable for desert land entry but no entry was allowed under the application prior to withdrawal of the lands from entry under the Desert Land Act.

Gerald W. Marlin et al., 98 IBLA 128 (June 19, 1987)

CULTIVATION AND RECLAMATION

A ruling by BLM that the jojoba plant does not meet the requirements of the desert land entry laws will not support rejection of a desert land entry application where the record does not indicate that BLM analyzed data submitted by the applicant showing

DESERT LAND ENTRY--Continued

CULTIVATION AND RECLAMATION--Continued

the economic feasibility of the commercial cultivation of the jojoba plant.

Wesley A. Painter, 98 IBLA 69 (June 9, 1987)

LANDS SUBJECT TO

In the absence of favorable action upon a petition to designate the land as suitable for desert land entry, an application for a desert land entry will not be considered a valid existing right excepted from a subsequent withdrawal order, and the application must be rejected by BLM, regardless of any challenge to the propriety and efficacy of the subsequent withdrawal.

Richard S. Gregory, 96 IBLA 256 (Mar. 25, 1987)

An application for a desert land entry is properly rejected where the lands at issue were previously classified as suitable for desert land entry but no entry was allowed under the application prior to withdrawal of the lands from entry under the Desert Land Act.

Gerald W. Marlin et al., 98 IBLA 128 (June 19, 1987)

WATER RIGHT

The Bureau of Land Management properly rejects a desert land application when the applicant proposes to irrigate his entry from underground water sources, but indicates on the face of the application that he has not taken appropriate steps, as far as then possible, toward the acquisition of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portions of the land described in the application.

Wesley A. Painter, 98 IBLA 69 (June 9, 1987)

ENVIRONMENTAL POLICY ACT

(See also National Environmental Policy Act of 1969--if included in this Index.)

A range improvement project is subject to the requirement that an environmental assessment be prepared. If a salient aspect of a project has not been assessed and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared.

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A decision that a proposed action does not require preparation of an environmental impact statement will be affirmed if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of the officer's study of such a record.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

ENVIRONMENTAL QUALITY

(See also Water Pollution Control--if included in this Index.)

ENVIRONMENTAL STATEMENTS

A range improvement project is subject to the requirement that an environmental assessment be prepared. If a salient aspect of a project has not been assessed and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared.

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A decision that a proposed action does not require preparation of an environmental impact statement will be affirmed if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

with established procedures, and is the reasonable result of the officer's study of such a record.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

EQUAL ACCESS TO JUSTICE ACT

ADVERSARY ADJUDICATION

Where BLM seeks to assess trespass damages and to take related action, including cancelling existing authorized grazing use, on the basis of charges that the permittee has grazed excess numbers of cattle in trespass on public land, followed by a hearing and appeal to the Board, BLM will be considered to have engaged in an adversary adjudication within the meaning of sec. 203(a)(1) of the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (Supp. III 1985).

Bureau of Land Management v. David & Bonnie Ericsson, 98 IBLA 258 (July 7, 1987)

APPLICATION

An application for an award of attorney's fees and expenses is properly denied where, although the applicant is the prevailing party in an adjudication of trespass charges and related action taken by BLM, BLM's decision to pursue such a course of action was substantially justified by circumstantial evidence pointing to a trespass on public land.

Bureau of Land Management v. David & Bonnie Ericsson, 98 IBLA 258 (July 7, 1987)

AWARDS

An application for an award of attorney's fees and expenses is properly denied where, although the applicant is the prevailing party in an adjudication of trespass charges and related action taken by BLM, BLM's decision to pursue such a course of action was

EQUAL ACCESS TO JUSTICE ACT--Continued

AWARDS--Continued

substantially justified by circumstantial evidence pointing to a trespass on public land.

Bureau of Land Management v. David & Bonnie Ericsson, 98 IBLA 258 (July 7, 1987)

CONTRACT DISPUTES ACT OF 1978

Substantially Justified

Where the Government has not acted arbitrarily or unreasonably in its negotiations prior to the Board's hearing on the merits of an underlying contract appeal, but facts and explanations become evident at the hearing that the Government would not ordinarily have been expected to know, which evidence ultimately entitles appellant to prevail on its contract claims, then the hearing was clearly essential to the appellant's case and appellant is not entitled to attorney fees or costs, since the Government's position in contesting the claim prior to the hearing was substantially justified.

Stephen J. Kenney (Application for Attorney Fees), IBCA-2132-F (Oct. 8, 1987)

EQUITABLE ADJUDICATION

SUBSTANTIAL COMPLIANCE

Substantial compliance with the law is a prerequisite for the invocation of equitable adjudication to permit consideration of a homesite purchase application that was not filed within the time required.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

ESTOPPEL

BLM is not estopped from declaring an unpatented mining claim located prior to Oct. 21, 1976, abandoned and void for failure to file a copy of an affidavit of assessment work or a notice of intention to hold the claim with BLM on or before Oct. 22, 1979, because BLM has delayed issuing such a declaration for a number of years.

John Robert Maytag, 95 IBLA 128 (Jan. 6, 1987)

If, subsequent to giving notice that a party is in trespass when removing sand and gravel from lands in which the Government has retained all minerals, BLM agrees to allow the mining operations to continue while negotiating a settlement of the issue of trespass damages, the continued operations should not be considered as willful trespass unless and until the operator is given notice that the mining operations should cease.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

Reliance on erroneous or incomplete information given by an employee of the Department cannot create any rights not authorized by law.

Raymond T. Duncan et al., 96 IBLA 352 (Apr. 8, 1987)

A party asserting a claim of estoppel based on a misrepresentation must be ignorant of the true facts and his reliance on the misrepresentation must be reasonable under the circumstances. Where appellant knew certain oil and gas leases were allegedly expired for lack of production from a communitized well, BLM will not be estopped to hold the leases expired based on a representation of a BLM employee without knowledge of the production status that, based on the records, the leases were in effect.

Landmark Exploration Co., 97 IBLA 96 (Apr. 29, 1987)

ESTOPPEL--Continued

BLM may properly declare simultaneous oil and gas lease applications unacceptable and return the filing fees and first year's rentals, minus a $75 processing fee for each Part B application form, where the applicant failed to submit separate remittances in payment of the filing fees and first year's rentals with each Part B application, notwithstanding written advice from BLM that a single remittance would be acceptable.

Thomas S. Arnold, 97 IBLA 271 (May 14, 1987)

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Peak River Expeditions (On Reconsideration), 98 IBLA 13 (May 29, 1987)

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

The Bureau of Indian Affairs is not estopped from reversing an approval of a lease document given in error.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

ESTOPPEL--Continued

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co.; the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations and reliance on incomplete or incorrect information cannot create any rights not authorized by law.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

EVIDENCE

BURDEN OF PROOF

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Louis Wolk, 100 IBLA 167 (Dec. 3, 1987)

CREDIBILITY

Where an applicant submits evidence which supports a conclusion that two copies of his noncompetitive lease offer were timely filed as required by the regulations in 43 CFR 3111.1-1(a), a decision rejecting that offer for failure to comply with the applicable

EVIDENCE--Continued

CREDIBILITY--Continued

regulation by filing only one copy of the lease offer will be set aside.

New Mexico & Arizona Land Co., 99 IBLA 190 (Oct. 13, 1987)

CREDIBILITY OF WITNESSES

In denying a request by appellant that the testimony of a project engineer on a Government project for the construction of a dam be disregarded as in conflict with an entry in the project diary made by an inspector, the Board noted that there appeared to be a reasonable basis for reconciling the purportedly conflicting evidence but that in any event there was an obligation to confront the project engineer with the diary entry at the hearing, if, after the record was closed, appellant was to rely upon the diary entry to discredit the testimony given by the project engineer.

A claim under a construction contract for diversion of a river around a construction site is denied, where the Board finds that prior to a dispute arising, the parties had interpreted the contract as requiring the contractor to do the work involving the diversion for which the claim was made.

A claim for additional costs incurred in placing a clay seal and performing other work related to preparation of the upstream apron foundation is denied, where the Board finds that the work covered by the claim stemmed from the flouting by appellant of the specification requirement that where concrete is to be placed on any excavated surface special care shall be taken not to disturb the bottom of the excavation more than necessary and that faced with the prospect of being required to remove all of the disturbed material in the area of the upstream apron and replace the same with concrete to the planned grade at the contractor's expense, the contractor opted to accept the clay-seal alternative and agreed to perform under such alternative at no additional cost to the Government.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

EVIDENCE--Continued

PREPONDERANCE

In an appeal involving the construction of a dam, a claim for the cost of modifying and repairing a return channel is denied, where the evidence shows that all of the costs involved would have been unnecessary if the return channel had been properly constructed in the first place.

A claim for the placement of sheet piling under a contract for the construction of a dam is denied, where the testimony of the project engineer that the contractor had proposed furnishing the sheet piling for its convenience is corroborated by a contemporaneous entry in the project diary and the testimony of appellant's vice president to the contrary is uncorroborated.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

PRESUMPTIONS

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, affidavits that copies of signed oil and gas lease offers were timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

David A. Gitlitz, 95 IBLA 221 (Jan. 15, 1987)

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed on or before Dec. 30, 1981, under sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1982), will not be overcome by proof that BLM mishandled evidence of annual assessment work filed during the 1984 calendar year.

Red Top Mercury Mines, Inc., 96 IBLA 391 (Apr. 14, 1987)

EVIDENCE--Continued

PRESUMPTIONS--Continued

The presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

The assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" does not apply to claims which did not exist at the time of publication of notice of a patent application and for which no adverse claim could have been filed.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), operates as a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim is valid under the mining laws. If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. If the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for land or apply for a patent himself.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

PRIMA FACIE CASE

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined the land within a claim and found the quantity and quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

United States v. Norman A. Whittaker, 95 IBLA 271 (Jan. 29, 1987)

EVIDENCE--Continued

PRIMA FACIE CASE--Continued

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim, and, based upon his examination, concludes the quantity and quality of the minerals is insufficient to support a finding of discovery, a prima facie case is established.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

SUFFICIENCY

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, affidavits that copies of signed oil and gas lease offers were timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

David A. Gitlitz, 95 IBLA 221 (Jan. 15, 1987)

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

Norman G. Lavery, 96 IBLA 294 (Mar. 31, 1987)

A hearing is not necessary in the absence of allegations of a material issue of fact, which, if proven, would alter the disposition of the appeal.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

EVIDENCE--Continued

WEIGHT

In denying a request by appellant that the testimony of a project engineer on a Government project for the construction of a dam be disregarded as in conflict with an entry in the project diary made by an inspector, the Board noted that there appeared to be a reasonable basis for reconciling the purportedly conflicting evidence but that in any event there was an obligation to confront the project engineer with the diary entry at the hearing, if, after the record was closed, appellant was to rely upon the diary entry to discredit the testimony given by the project engineer.

In an appeal involving the construction of a dam, a claim for the cost of modifying and repairing a return channel is denied, where the evidence shows that all of the costs involved would have been unnecessary if the return channel had been properly constructed in the first place.

A claim for the placement of sheet piling under a contract for the construction of a dam is denied, where the testimony of the project engineer that the contractor had proposed furnishing the sheet piling for its convenience is corroborated by a contemporaneous entry in the project diary and the testimony of appellant's vice president to the contrary is uncorroborated.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

EXCHANGES OF LAND
(See also Indians, Private Exchanges, State Exchanges, Wildlife Refuges & Projects--if included in this Index.)

GENERALLY

Under the regulations at 43 CFR Subpart 3435 which were promulgated to implement, inter alia, the Act of Oct. 30, 1978, P.L. 95-554, 92 Stat. 2073, a coal lease exchange proposal shall be evaluated in terms of whether the exchange is in the public interest. The Act of Oct. 30, 1978, authorizes the Secretary to approve lease exchanges for all or portions of specified existing leases transected by parts of Interstate Highway 90 in Wyoming, in order to avoid conflicts and problems associated with surface mining

EXCHANGES OF LAND--Continued

GENERALLY--Continued

near or under highways. A decision by the Bureau of Land Management rejecting an exchange proposal submitted under that Act will be vacated when it fails to undertake the public interest determination required by both the regulations at 43 CFR 3435.2(c) and by the terms of an agreement entered into between the coal lessee and the Government.

Belco Petroleum Corp., 96 IBLA 126 (Mar. 11, 1987)

FEDERAL EMPLOYEES AND OFFICERS
(See also Administrative Authority, Claims Against the United States, Officers & Employees--if included in this Index.)

GENERALLY

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)
94 I.D. 132

The presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

Where appellant fails to establish entitlement to reimbursement for alleged overcharges of rental, his claim for such reimbursement is properly denied.

Appeal of John R. Haugh, 7 OHA 87 (June 29, 1987)

Appeal of Robert W. Jones, 7 OHA 91 (June 29, 1987)

Appeal of Cyrus J. Sokoll, 7 OHA 95 (June 29, 1987)

FEDERAL EMPLOYEES AND OFFICERS--Continued

GENERALLY--Continued

The annual Consumer Price Index adjustment for Government-furnished quarters rental rates should be calculated from the month and year of the regional survey or reappraisal of the private rental market on which the rental rates were based.

Appeal of James E. Brooks, Roger L. Hamman, & Buddy L. Jensen, 7 OHA 124 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

In the Matter of the Rental Rate Appeal of Gary Gissell, 7 OHA 128 (Oct. 16, 1987)

In the Matter of the Rental Rate Appeal of Duncan Hollar, 7 OHA 131 (Oct. 16, 1987)

An appeal from a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

When an issue raised on appeal from a rental rate adjustment for Government-furnished quarters is appropriate for consideration by the agency under 41 CFR 114-52.301(d), the issue will be remanded for such consideration.

A rental rate adjustment for Government-furnished quarters will be upheld when the appellant fails to submit evidence overcoming the agency's showing of regularity in the adjustment.

In the Matter of the Rental Rate Appeal of Robert E. Johnson, 7 OHA 134 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

A rental rate adjustment for Government-furnished quarters that is based on changes in the Consumer Price Index (CPI) is properly deferred 1 year when a rental

FEDERAL EMPLOYEES AND OFFICERS--Continued

GENERALLY--Continued

rate survey is conducted within 6 months before or after the CPI adjustment is scheduled to be made.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

In the Matter of the Rental Rate Appeal of Ronald M. Mackie, 7 OHA 138 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

The annual Consumer Price Index adjustment to the rental rate for Government-furnished quarters may not be used as a vehicle to challenge a prior regional rental rate survey.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

Notification of a rental rate adjustment for Government-furnished quarters is timely if the notice of adjustment is mailed to the tenant at least 30 days prior to implementation of the adjustment.

In the Matter of the Rental Rate Appeal of Randolph L. August, 7 OHA 143 (Oct. 16, 1987)

An administrative agency has authority to correct its own erroneous interpretation of law so long as the departure from prior practice is explained and shown not to be arbitrary or capricious.

In the Matter of the Rental Rate Appeal of Nancy A. Hunter, 7 OHA 148 (Oct. 16, 1987)

FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT

Where a homestead entryman alleges that, based on the advice of a BLM employee, he refrained from filing a private contest pursuant to 43 CFR 4.450-1 against an entry adverse to his own, estoppel will not lie against the Government where the entryman is unable to show that he was ignorant of the true facts.

John R. Dean, 96 IBLA 239 (Mar. 24, 1987)

Reliance on erroneous or incomplete information given by an employee of the Department cannot create any rights not authorized by law.

Raymond T. Duncan et al., 96 IBLA 352 (Apr. 8, 1987)

Reliance on erroneous information provided by a BLM employee cannot relieve the owner of an unpatented mining claim of an obligation imposed by statute, create rights not authorized by law, or relieve the claimant of the consequences imposed by the statute for failure to comply with its requirements.

Steve E. Cate, 97 IBLA 27 (Apr. 23, 1987)

The Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations and reliance on incomplete or incorrect information cannot create any rights not authorized by law.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976
(See also Hearings, Rights-of-Way--if included in this Index.)

ASSESSMENT WORK

Where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30.

Ronald Willden, 97 IBLA 40 (Apr. 23, 1987)

A party seeking judicial review of a Departmental decision holding the party's mining claim to be abandoned and void for failure to satisfy the requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), need not continue to satisfy the annual filing requirements of sec. 314 while judicial review is in progress.

J. L. Block, 98 IBLA 209 (July 1, 1987)

CORRECTION OF CONVEYANCE DOCUMENTS

BLM may properly reject an application to correct a homestead patent to include certain land where, although the original patentee may have intended to enter that land, the applicant acquired the patented homestead with a specific disclaimer of any transfer of the land and, thus, has no equitable interest in the land.

Arthur Warren Jones et al., 97 IBLA 253 (May 13, 1987)

HEARINGS

BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands for a violation of any term or condition of the instrument only after notice and an opportunity for a hearing, unless BLM determines that an immediate temporary suspension is necessary to protect health or safety or the environment, or that other applicable law contains specific provisions for suspension,

HEARINGS--Continued

revocation, or cancellation of a particular land-use authorization.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

LAND USE PLANNING

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

LEASES

A decision imposing fair market rental for a small tract lease will be affirmed where the appraisal determining the fair market rental value is conducted following established criteria, and the lessee fails to show error in the appraisal methods or present convincing evidence that the charges are excessive.

Lawrence Dupuis, 99 IBLA 174 (Oct. 2, 1987)

PERMITS

BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands for a violation of any term or condition of the instrument only after notice and an opportunity for a hearing, unless BLM determines that an immediate temporary suspension is necessary to protect health or safety or the environment, or that other applicable law contains specific provisions for suspension, revocation, or cancellation of a particular land-use authorization.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

BLM may properly cause the holder of a special recreation permit for commercial use of a wild and scenic river to forfeit two scheduled trips where the evidence establishes that, in the preceding year's regulated use period, the permittee launched a scheduled trip without checking in at the necessary location on the day of the launch, as required by stipulations incorporated in the permit.

BLM may properly place the holder of a special recreation permit for commercial use of a wild and scenic river on a probationary status where the evidence establishes that the permittee gave his trip card to someone other than a bona fide employee, who then conducted the scheduled trip, thereby effecting a partial assignment of his permit in violation of the stipulations incorporated in his permit.

Robert L. Snook d.b.a. Beaver State Adventures, 100 IBLA 151 (Dec. 3, 1987)

PLAN OF OPERATIONS

The surface management regulations at 43 CFR Subpart 3809 implement the mandate of sec. 302(b) of the Federal Land Policy and Management Act of 1976 to manage the public lands to prevent unnecessary and undue degradation. A decision of BLM requiring a mining claimant to operate under an approved plan of operations on the basis that mining operations would cause a cumulative surface disturbance in excess of 5 acres during a calendar year will be affirmed where appellant fails to sustain the burden of showing that 5 acres or less is involved. Although the regulations governing reclamation of disturbed areas permit deferral of reclamation for legitimate mining purposes, unreclaimed surface disturbance from a prior year's operation is properly included in the acreage computation for purposes of determining whether a plan of operations is required.

Differential Energy, Inc., 99 IBLA 225 (Oct. 16, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS--Continued

Where a hearing into the availability for use of a water supply for a mining operation located within a wilderness study area has previously been held and a final decision rendered on the question, and such determination is dispositive of the question of the feasibility of the plans of mining operations under review, no further factfinding is required.

Approval of mining plans of operations for a cyanide leaching operation may be properly rescinded where the plans are shown to have been approved in error because an assumption was made that an adequate supply of water was available which did not in fact exist.

Far West Exploration, Inc., 100 IBLA 306 (Dec. 28, 1987)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM

BLM is not estopped from declaring an unpatented mining claim located prior to Oct. 21, 1976, abandoned and void for failure to file a copy of an affidavit of assessment work or a notice of intention to hold the claim with BLM on or before Oct. 22, 1979, because BLM has delayed issuing such a declaration for a number of years.

John Robert Maytag, 95 IBLA 128 (Jan. 6, 1987)

Lands tentatively approved for conveyance to the State of Alaska were legislatively conveyed to the State by sec. 906 of the Alaska National Interest Lands Conservation Act, and consequently the Department may no longer adjudicate unpatented mining claims located upon such lands. Since sec. 314 of the Federal Land Policy and Management Act of 1976 applies only to public lands of the United States, the filing and recording requirements of sec. 314 do not apply to such legislatively conveyed lands, and the statutory filing requirements may not be relied upon to invalidate or otherwise determine the status of unpatented mining claims located on such conveyed lands.

Mary Lou Redmond, 95 IBLA 379 (Feb. 20, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed on or before Dec. 30, 1981, under sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1982), will not be overcome by proof that BLM mishandled evidence of annual assessment work filed during the 1984 calendar year.

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of any calendar year following the first filing of such evidence or notice.

Not every document filed with BLM from which intent might be inferred is sufficient to meet the statutory and regulatory requirements for notices of intention to hold mining claims. Such a document must be filed as a notice of intent and meet those requirements.

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite claim abandoned and void without first according the claimant an opportunity to comply with a notice of deficiency.

Red Top Mercury Mines, Inc., 96 IBLA 391 (Apr. 14, 1987)

In the case of a mining claim located prior to Oct. 21, 1976, the failure to file one of the instruments required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), on or before Oct. 22, 1979, and prior to Dec. 31 of every year thereafter in the proper BLM office conclusively constitutes abandonment of the mining claim by the owner and renders the claim void.

Steve E. Cate, 97 IBLA 27 (Apr. 23, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of the year following the year in which the claim was located, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982).

Where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30.

Ronald Willden, 97 IBLA 40 (Apr. 23, 1987)

Lands tentatively approved for conveyance to the State of Alaska were legislatively conveyed to the State by sec. 906 of the Alaska National Interest Lands Conservation Act, and consequently the Department may no longer adjudicate the validity of unpatented mining claims located on such lands. Since sec. 314 of the Federal Land Policy and Management Act of 1976 applies only to public lands of the United States, the filing and recording requirements of sec. 314 do not apply to such legislatively conveyed lands, and the statutory filing requirements may not be relied upon to invalidate or otherwise determine the status of unpatented mining claims located on such conveyed lands.

Melvin N. Barry, Frank Simpson, 97 IBLA 359 (May 26, 1987)

Departmental regulation 43 CFR 3833.0-5(m), promulgated in Dec. 1982, treats as "timely filed" a mining claim recordation document received by the Bureau of Land Management within 20 days of the statutory deadline for annual mining claim recordation filings if transmitted in an envelope bearing a clearly dated postmark affixed by the United States Postal Service denoting the document was mailed on or before Dec. 30 of the filing year. This regulation took

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

effect Dec. 30, 1982, and in accordance with United States v. Locke, 471 U.S 84, 102 n.14 (1985), it cannot be applied retroactively.

Lindsay Lee Lemons, 98 IBLA 75 (June 9, 1987)

Sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), requires the owner of an unpatented mining claim located prior to Oct. 21, 1976, to file evidence of annual assessment work or notice of intention to hold with the Bureau of Land Management on or before Oct. 22, 1979, and on or before Dec. 30 of each year thereafter. This requirement is mandatory and the failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and render the claim void.

Although 43 U.S.C. § 1744(a) does not prescribe the form a notice of intention to hold a mining claim must take, not every document sent to BLM from which intent might be inferred is sufficient. Whatever the form of the instrument, it must be filed with BLM as a notice of intent to hold, indicating that the claim owner continues to have an interest in the claim. The instrument must also include a description of the location of the mining claim sufficient to locate the claimed lands on the ground, the BLM assigned claim number, or the name of the claim. It must also be evident that a copy of the document was or will be recorded with the county or local recorder's office.

R. H. Gunn, 98 IBLA 104 (June 15, 1987)

Sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), requires the owner of a lode or placer mining claim located prior to its enactment on Oct. 21, 1976, to file with BLM "within the three-year period following the date of the approval of this Act and prior to Dec. 31 of each year thereafter," a copy of either a notice of intention to hold the mining claim or an affidavit of assessment work. The phrase "each year thereafter"

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

refers to the years following the calendar year in which either evidence of assessment work or a notice of intention to hold the claim was first filed.

In order for a document filed with BLM to qualify under 43 U.S.C. § 1744(a) (1982) as a notice of intention to hold a mining claim, the document must have been filed with BLM as a notice of intent, must be a copy of a document that was or will be filed with the local jurisdiction where the claim's location certificate was recorded, and must identify the claim by name, by BLM-assigned claim number, or by a description sufficient to locate the claim on the ground.

L & S Mines, 98 IBLA 123 (June 19, 1987)

A party seeking judicial review of a Departmental decision holding the party's mining claim to be abandoned and void for failure to satisfy the requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), need not continue to satisfy the annual filing requirements of sec. 314 while judicial review is in progress.

J. L. Block, 98 IBLA 209 (July 1, 1987)

Sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2-1, require the owner of an unpatented mining claim located on public land to file evidence of assessment work performed or a notice of intention to hold the mining claim with the proper BLM office prior to Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the mining claim.

Under 43 CFR 3833.4(b), the failure of a holder of a mill or tunnel site claim to timely file an annual notice of intention to hold the claim is a curable defect. However, this regulation applies only to those documents not specifically required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). The holder of an unpatented

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

placer or lode mining claim cannot rely on this regulation to cure his failure to timely file a notice of intention to hold the mining claim, because the requirement to file annual documents for a lode or placer mining claim is a statutory requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Wilbur H. Stark, 98 IBLA 254 (July 7, 1987)

The owner of a mining claim located after Oct. 21, 1976, is required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), to file a notice of intention to hold the claim or evidence of assessment work performed on the claim, in the county where the location notice is of record and in the proper office of BLM prior to Dec. 31 of each year following the calendar year in which the claim is located. Failure to file the instrument required by the statute constitutes an abandonment of the claim.

With respect to an unpatented mining claim located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either a notice of intention to hold the claim or evidence of assessment work both in the local recording office where the notice of location is recorded and in the proper office of BLM prior to Dec. 31 of the year following the calendar year in which the claim was located, as required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Oliver B. Kilroy, 99 IBLA 33 (Aug. 31, 1987)

Where a mining claimant inadvertently omits the name and serial number of unpatented mining claims from the notice of intention to hold and there is no other means of identifying the claims on the document, BLM properly declares the claims abandoned and void for failure to comply with 43 CFR 3833.2. Although a filing may be supplemented by subsequent submission of information not required by statute without a statutory presumption of abandonment, there is no authority for

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

amendment of the notice of intention to hold to include a previously omitted claim after the filing deadline.

Ethel Bilotte, 99 IBLA 159 (Sept. 29, 1987)

RECORDATION OF MINING CLAIMS AND ABANDONMENT

The Bureau of Land Management may not reject the filing of a notice of location that was filed before the lands upon which the mining claim was located were the subject of an interim conveyance.

Eskil Anderson, 95 IBLA 253 (Jan. 23, 1987)

BLM may properly require a mineral locator to supply a description of the location of his claim to within a quarter section if this information has not been provided with the filing of a location notice. A locator's failure to properly record a claim may result in a determination that it has been abandoned and is therefore void. However, a locator's failure to file a map or the information required by the regulations is a curable defect, and BLM must notify the claimant and provide an opportunity to supply the information before declaring the claim abandoned and void.

A mining claimant is not required to submit to BLM information sufficiently precise for his claim to be projected onto a township plat. Neither the statute nor the regulations requires a precise map or description of the position of a claim. The test established by statute for the sufficiency of a recorded description is whether the claim may in fact be found and identified on the ground by following the information provided. This is a factual question and unless the description or map is on its face so deficient as to be inadequate as a matter of law, the issue of its sufficiency can be determined only by testing the information in the field.

Because a recorded description and the map filed with BLM are not required to be precise, the uses which may be made of information submitted necessarily depend upon its relative accuracy. If accurate, a map will show the position of a claim in relation to landmarks or the legal boundaries of the public land survey, and may permit BLM to determine that the land on which the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

claim is located has been withdrawn. But a map is useful only to the extent it accurately represents the territory and claim mapped.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

An unpatented mining claim must be deemed abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), where there is no evidence that an instrument of recordation and an initial affidavit of assessment work or notice of intention to hold the claim was filed within the 3-year period following Oct. 21, 1976, by the purported owner of the claim, a predecessor in interest, or an agent.

Mascot Mining, Inc., 95 IBLA 328 (Jan. 30, 1987)

In the case of a mining claim located prior to Oct. 21, 1976, the failure to file one of the instruments required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), on or before Oct. 22, 1979, and prior to Dec. 31 of every year thereafter in the proper BLM office conclusively constitutes abandonment of the mining claim by the owner and renders the claim void.

Steve E. Cate, 97 IBLA 27 (Apr. 23, 1987)

Where the 90th day following the date of location of a mining claim falls on a Sunday, a day that the proper BLM office for recording such claim is officially closed, recordation is timely if a copy of the official record of the notice or certificate of location is hand delivered on Monday, the 91st day after location.

Birco Development, 97 IBLA 259 (May 13, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

BLM may properly declare an unpatented mining claim abandoned and void and reject the recordation of affidavits of assessment work where the owner of the claim failed to file a copy of the notice of location for the claim timely with BLM, pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982).

C. Bert Sanger Trust, 97 IBLA 356 (May 26, 1987)

A locator is not required to submit to BLM a precise description of the position of his claims. The test as to whether a recorded description is sufficient is whether the claim may in fact be found and identified by following the recorded description. Because the information provided to BLM is not required to be precise, the uses which may be made of it necessarily depend upon its relative accuracy. Information provided by a locator may be sufficient to meet the statutory requirement yet be insufficient to support a determination that the claim is null and void for being located on previously patented, withdrawn, or reserved land.

United States Borax & Chemical Co., 98 IBLA 358 (July 31, 1987)

The owner of mining claims located after Oct. 21, 1976, must file copies of the notices of location of the claims with BLM within 90 days of the dates of location of the claims, failing which the claims are properly declared abandoned and void.

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under Utah law, the date of location is that date specified in the notice of location posted on the mining claim and in the copy of the notice of location filed with the county recorder's office.

Kerry Shumway, 99 IBLA 156 (Sept. 25, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

REPEALERS

Mining claims located on lands withdrawn for reclamation purposes under the first form are null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Frank David Hill, 99 IBLA 16 (Aug. 14, 1987)

RESERVATION AND CONVEYANCE OF MINERAL INTERESTS

An application for conveyance of Federally owned mineral interests to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), is properly rejected where the mineral interests are the subject of a valid minerals site right-of-way.

Kenneth L. Ingram et al., 96 IBLA 290 (Mar. 31, 1987)

RIGHTS-OF-WAY

The Alaska Native Claims Settlement Act requires the Secretary of the Interior to manage lands selected by a Native village corporation in accordance with applicable laws and regulations. The Secretary may issue rights-of-way over, upon, under, or through such land pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982).

BLM's decision granting a right-of-way for water treatment facilities will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason to disturb the decision is shown. Under 43 CFR 2650.1(a), the decision to issue such a right-of-way on land selected by a Native village corporation under the Alaska Native Claims Settlement Act must consider the views of the village; if the village does not consent to the right-of-way, the Department must balance the public interest against the interests of the village, issuing

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

the right-of-way only if the public interest outweighs the objections of the village.

The municipal holder of a right-of-way for a water treatment plant must pay fair market rental in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761-1771 (1982), requires that a right-of-way application be approved prior to transporting water across public land for any mining purpose. Approval of a right-of-way application is within the discretion of the Secretary of the Interior. A decision by the Secretary's delegate, made in exercise of such discretion, will be affirmed in the absence of sufficient reason to disturb it.

Desert Survivors, 96 IBLA 193 (Mar. 19, 1987)

Departmental precedent and regulations establish that sec. 28 of the Mineral Leasing Act of 1920, as amended, provides the proper authority for issuance of pipeline rights-of-way for transportation of gas produced from Federal oil and gas leases. Where the pipeline is constructed off-lease, this is true regardless of whether the pipeline facility is characterized as a gathering line or production facility on the one hand or a pipeline for transportation of gas to market on the other hand. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982), authorizing rights-of-way for "natural gas" pipelines provides the proper statutory authority for a right-of-way for a pipeline to transport all component gases produced from a well on Federal oil and gas leases, including a pipeline exclusively devoted to transportation of carbon dioxide

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

subsequently separated from the other components of the gas stream emanating from the wellhead. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Exxon Corp., 97 IBLA 45 (Apr. 23, 1987) 94 I.D. 139

Where BLM grants a communication site right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982) and the grantee fails to file an application for assignment as required by 43 CFR 2803.6-3, rental resulting from a subsequent appraisal may be properly assessed against the grantee. The period of assessment properly included that period the grantee, under a private arrangement, allowed another party to use the right-of-way.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

Rejection of an application for a right-of-way for road access across Federal lands not under lease to a drill site on a Federal oil and gas lease may be reasonable where it is filed too close to the expiration date of the lease (after which the right-of-way would be meaningless) to allow processing consistent with the Department's statutory obligations under the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976. However, where an application for suspension of operations is filed prior to lease expiration to obtain time for approval of the right-of-way, rejection of the right-of-way application will be set aside as premature in the absence of an adjudication of the request for suspension.

John March, 98 IBLA 143 (June 22, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Where a right-of-way applicant was charged $375 for 5-years use of a linear road right-of-way, contrary to provision of a Bureau of Land Management Instruction Memorandum requiring that new linear rights-of-way should be charged a minimum rental of $25 for 5 years pending final approval of regulations implementing a uniform system of appraisal for such rights-of-way, the decision establishing the $375 rate must be vacated.

Where there is an indication in the case file that a road for which an application for a right-of-way has been made may be an existing public highway, a decision establishing a rental charge for use of the right-of-way is vacated and the case file remanded for further fact-finding to determine whether the road right-of-way is properly subject to any rental charge.

Dean R. Karlberg, 98 IBLA 237 (July 6, 1987)

A telephone microwave repeater station financed pursuant to the Rural Electrification Act, 7 U.S.C. § 901 (1982), is a facility for which a right-of-way shall be granted without rental fees, as provided by the Act of May 25, 1984, P.L. 98-300, 98 Stat. 215, amending 43 U.S.C. § 1764(g) (Supp. III 1985).

South Central Utah Telephone Ass'n, Inc., 98 IBLA 275 (July 17, 1987)

If a rental charge required by 43 CFR 2803.1-2 is not paid when due, and such default continues for 30 days after notice, BLM may take action to terminate a right-of-way grant issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982). When the holder of a right-of-way grant has not paid rent for over 2 years, BLM may properly terminate the right-of-way grant.

Aztec Energy Corp., 98 IBLA 372 (Aug. 3, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Where BLM issues a right-of-way grant which includes a provision stating that the grant is renewable under certain conditions, the grant does not automatically terminate on its expiration date but is subject to renewal in accordance with the stated terms and conditions, and 43 CFR 2803.6-5(a).

Coors Energy Co., 99 IBLA 37 (Sept. 8, 1987)

Under the regulations governing right-of-way applications, the authorized officer may require the applicant to submit additional information as he deems necessary. Also, the authorized officer is required to issue a deficiency notice when he finds the information supplied is incomplete or not in conformance with the law. However, the authorized officer is not required to request further information prior to issuance of a deficiency notice.

A right-of-way application for a wind farm is a request for a non-linear right-of-way, and, therefore, processing fee requirements are governed by 43 CFR 2803.1-1(a)(3)(ii). Where BLM requests submission of additional fees to cover processing costs for such a non-linear right-of-way, and the applicant fails to pay such fees, a BLM decision rejecting the application for failure to make additional payment will be upheld on appeal.

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

BLM may condition approval of a right-of-way for an access road upon acceptance by the right-of-way applicant of stipulations imposing liability for any damage or injury incurred by the United States or third parties in connection with use of the right-of-way area by the applicant, where those stipulations reflect regulatory requirements which are binding on the Department.

Carl H. Alber, Jr., 100 IBLA 257 (Dec. 9, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

An appraisal of a reservoir right-of-way granted pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be upheld on appeal if no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

Delbert Jones, 100 IBLA 289 (Dec. 16, 1987)

SALES

Under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), and applicable regulations, BLM may resolve an unauthorized use of public land by private, noncompetitive sale of the parcel. It is within the discretion of the authorized officer to exclude from sale lands considered to have wetland and riparian values and to retain such lands in public ownership.

C. Sody Soderstrom, 95 IBLA 382 (Feb. 20, 1987)

When BLM determines to sell a tract of public land because the land is difficult and uneconomic to manage, one of the standards for disposal set forth in sec. 203(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(a) (1982), and that determination is protested by a group holding grazing permits for such land, the decision denying the protest will be set aside where the group alleges the land is not difficult and uneconomic to manage and there is a lack of substantial evidence in the record to support BLM's determination.

Washboard Permittee Group, 99 IBLA 10 (Aug. 12, 1987)

Where an individual files an "appeal" with BLM of a notice of a proposed direct sale of certain public lands, that filing is not an appeal under 43 CFR 4.410; rather it is a protest, which, under 43 CFR 4.450-2, is any objection to any action proposed to be taken by BLM.

BLM may properly decide to make a direct sale of an isolated parcel of public land to an existing

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SALES--Continued

grazing user, who is also one of the adjoining landowners, rather than engage in regular or modified competitive bidding, under sec. 203(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(f) (1982).

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

SURFACE MANAGEMENT

Application of the "unnecessary or undue degradation" standard presumes the validity of the use which is causing the impact and seeks to determine whether the impact is greater than should be expected to occur if the activity were conducted by a prudent operator in the usual, customary, and proficient conduct of similar operations.

When BLM determines, after such notice and opportunity for hearing as may be required by due process, that a mining claim is not supported by a discovery of a valuable mineral deposit, it may declare that mining claim null and void and reject a proposed plan of operations submitted for that claim.

Southwest Resource Council, 96 IBLA 105 (Mar. 10, 1987)
94 I.D. 56

WILDERNESS

Where an oil and gas lease, issued after the enactment of the Federal Land Policy and Management Act of 1976, embraces lands within a wilderness study area and the lessee is denied an application for permit to drill for failure to meet the nonimpairment standard, a subsequent request for suspension of operations and production will be adjudicated on the basis of whether or not at the time of issuance BLM encumbered the lease with a wilderness protection or no-surface-occupancy stipulation. The suspension policy, as set forth in the "Interim Management Policy and Guidelines for Lands under Wilderness Review," is to grant a suspension for

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

such a lease issued without either of those stipulations.

Amoco Production Co., et al. (On Reconsideration), 96 IBLA 260 (Mar. 26, 1987)

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

Norman G. Lavery, 96 IBLA 294 (Mar. 31, 1987)

BLM may properly reject a proposed modification of an approved plan of operations, seeking to engage in open pit mining within a wilderness study area, where the record establishes that the proposed operation would impair the naturalness of the study area. In addition, BLM may properly require the mining claimant to undertake reclamation of any area affected by unauthorized mining operations.

L. C. Artman et al., 98 IBLA 164 (June 24, 1987)

No violation of the nonimpairment policy set forth in sec. 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1982), is established by BLM's grant of a right-of-way across public lands adjacent to a wilderness study area where the right-of-way will permit the developer of a hydroelectric concern to convey water diverted from a river entering the wilderness study area.

California Wilderness Coalition et al., 98 IBLA 314 (July 30, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WITHDRAWALS

Mining claims located on lands withdrawn for reclamation purposes under the first form are null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Frank David Hill, 99 IBLA 16 (Aug. 14, 1987)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

ROYALTIES

The Department is authorized to reduce the royalty rate on a lease reinstated pursuant to sec. 401 of the Federal Oil and Gas Royalty Management Act at a higher royalty rate where "there are uneconomic or other circumstances which could cause undue hardship." 30 U.S.C. § 188(i)(2) (1982). Where the lessee has offered evidence that a reinstated competitive lease was extended by drilling over the lease expiration date, that a producing well was subsequently completed, and that the well will never reach payout, a decision rejecting a petition without applying the statutory criteria will be set aside and remanded for further consideration.

Alta Energy Corp., 100 IBLA 313 (Dec. 28, 1987)

FEES
(See also Accounts--if included in this Index.)

The municipal holder of a right-of-way for a water treatment plant must pay fair market rental in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

FEES--Continued

Where a right-of-way applicant was charged $375 for 5-years use of a linear road right-of-way, contrary to provision of a Bureau of Land Management Instruction Memorandum requiring that new linear rights-of-way should be charged a minimum rental of $25 for 5 years pending final approval of regulations implementing a uniform system of appraisal for such rights-of-way, the decision establishing the $375 rate must be vacated.

Where there is an indication in the case file that a road for which an application for a right-of-way has been made may be an existing public highway, a decision establishing a rental charge for use of the right-of-way is vacated and the case file remanded for further fact-finding to determine whether the road right-of-way is properly subject to any rental charge.

Dean R. Karlberg, 98 IBLA 237 (July 6, 1987)

A telephone microwave repeater station financed pursuant to the Rural Electrification Act, 7 U.S.C. § 901 (1982), is a facility for which a right-of-way shall be granted without rental fees, as provided by the Act of May 25, 1984, P.L. 98-300, 98 Stat. 215, amending 43 U.S.C. § 1764(g) (Supp. III 1985).

South Central Utah Telephone Ass'n, Inc., 98 IBLA 275 (July 17, 1987)

A decision imposing fair market rental for a small tract lease will be affirmed where the appraisal determining the fair market rental value is conducted following established criteria, and the lessee fails to show error in the appraisal methods or present convincing evidence that the charges are excessive.

Lawrence Dupuis, 99 IBLA 174 (Oct. 2, 1987)

GEOTHERMAL LEASES
(See also Hearings, Mineral Leasing Act--if included in this Index.)

APPLICATIONS

Generally

Land included within an outstanding geothermal resources lease, whether the lease is void, voidable, or valid, is not available for leasing, and an offer filed for such land must be rejected.

Ralph L. Phelps, Jr., 97 IBLA 397 (May 27, 1987)

Lands designated by Congress as a component of the National Wilderness Preservation System are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984. A Bureau of Land Management decision rejecting geothermal lease offers for lands within a designated wilderness area will be affirmed in the absence of a showing of valid existing rights.

Eugene Water & Electric Board, 98 IBLA 272 (July 10, 1987)

COMPETITIVE LEASES

The Secretary of the Interior has the discretionary authority to reject a competitive geothermal lease bid where it fails to reflect fair market value for the parcel. A decision rejecting a bid on such a basis will be affirmed where the record establishes a rational basis for the conclusion and appellant has neither rebutted the basis for the conclusion nor shown that his bid represents fair market value.

Grant S. Lyddon, 98 IBLA 321 (July 30, 1987)

GEOTHERMAL LEASES--Continued

ENVIRONMENTAL PROTECTION

Generally

When BLM has adopted a staged leasing program and notifies a potential geothermal lessee that all post-lease plans for exploration and development are subject to site-specific environmental review, and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result, it is not necessary to prepare an environmental impact statement prior to leasing.

Union Oil Co. of California, 99 IBLA 95 (Sept. 17, 1987)

LANDS SUBJECT TO

Land included within an outstanding geothermal resources lease, whether the lease is void, voidable, or valid, is not available for leasing, and an offer filed for such land must be rejected.

Ralph L. Phelps, Jr., 97 IBLA 397 (May 27, 1987)

Lands designated by Congress as a component of the National Wilderness Preservation System are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984. A Bureau of Land Management decision rejecting geothermal lease offers for lands within a designated wilderness area will be affirmed in the absence of a showing of valid existing rights.

Eugene Water & Electric Board, 98 IBLA 272 (July 10, 1987)

RELINQUISHMENTS

A relinquishment of a geothermal lease will not be accepted if it is filed by an individual who cannot establish his authority to act on behalf of the lessee of record.

Ralph L. Phelps, Jr., 97 IBLA 397 (May 27, 1987)

GEOTHERMAL LEASES--Continued

ROYALTIES

In determining the royalty due to the United States pursuant to a geothermal resource lease, it is proper for the Minerals Management Service to include, as part of the value basis for computing royalty, the amounts the purchasers of the steam have paid to the lessee for effluent disposal. Such payments are in the nature of a reimbursement of expenses, are properly viewed as part of the total consideration accruing to the lessee from the sale of the geothermal resources, and are a part of the geothermal production subject to royalty as required by 30 CFR 206.300.

Geysers Geothermal Co., 100 IBLA 282 (Dec. 16, 1987)

GRAZING AND GRAZING LANDS

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Lewis M. Webster v. Bureau of Land Management, 97 IBLA 1 (Apr. 16, 1987)

When a grazing lessee agrees to an additional stipulation providing that the grazing lease may be terminated upon 30-days notice if the BLM acts upon a state selection application encompassing the leased lands, BLM need not submit a state grazing lease in conjunction with the notice of termination.

Harold Sargent, 100 IBLA 267 (Dec. 15, 1987)

GRAZING LEASES
(See also Taylor Grazing Act--if included in this Index.)

CANCELLATION OR REDUCTION

Lands leased under the Act of Mar. 4, 1927, are not subject to settlement, location, and acquisition under the nonmineral land laws applicable to Alaska unless and until the authorized officer determines that the grazing lease should be canceled or reduced.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

When a grazing lessee agrees to an additional stipulation providing that the grazing lease may be terminated upon 30-days notice if the BLM acts upon a state selection application encompassing the leased lands, BLM need not submit a state grazing lease in conjunction with the notice of termination.

Harold Sargent, 100 IBLA 267 (Dec. 15, 1987)

PREFERENCE RIGHT APPLICANTS

Grazing use of land administered by a county government as a result of a grant to that governmental body pursuant to the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), will not be credited as "historical use" for the purposes of adjudicating the competing qualifications of grazing applications pursuant to 43 CFR 4130.1-2.

Lewis M. Webster v. Bureau of Land Management, 97 IBLA 1 (Apr. 16, 1987)

GRAZING PERMITS AND LICENSES
(See also Appeals, Hearings, Taylor Grazing Act--if included in this Index.)

GENERALLY

A grazing licensee's right to request an adjustment of grazing privileges under a range-line agreement will not be barred by laches if the facts show that there has been no lack of diligence in asserting the claim.

Where grazing licensees have executed a valid range-line agreement approved by this Department, such an agreement has generally been treated by the Department as an enforceable contract. Therefore, those terms specifically set forth in the agreement which are unmistakably clear are binding upon the parties unless changed by their mutual consent with BLM's approval.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

When BLM determines to sell a tract of public land because the land is difficult and uneconomic to manage, one of the standards for disposal set forth in sec. 203(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(a) (1982), and that determination is protested by a group holding grazing permits for such land, the decision denying the protest will be set aside where the group alleges the land is not difficult and uneconomic to manage and there is a lack of substantial evidence in the record to support BLM's determination.

Washboard Permittee Group, 99 IBLA 10 (Aug. 12, 1987)

ADJUDICATION

When a range-line agreement between two licensees provides a division of the range will stand until such time as a range study is conducted, and the range study indicates the allotments do not fairly represent the proportion of range lands each party is entitled to on a demand-forage basis, an Administrative Law Judge's decision finding that one of the licensees may be entitled to an adjustment of grazing privileges and

ADJUDICATION--Continued

remanding the case to BLM to effect an equalization will be affirmed upon appeal.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

Where there has been a decrease in Federal lands available for grazing, BLM may impose a proportionate reduction among all the authorized users of a particular allotment as proportionate reduction is consistent with the reduction required under 43 CFR 4110.4-2(a).

B. G. Bunyard v. Bureau of Land Management, 96 IBLA 143 (Mar. 12, 1987)

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Lewis M. Webster v. Bureau of Land Management, 97 IBLA 1 (Apr. 16, 1987)

Where BLM seeks to assess trespass damages and to take related action, including cancelling existing authorized grazing use, on the basis of charges that the permittee has grazed excess numbers of cattle in trespass on public land, followed by a hearing and appeal to the Board, BLM will be considered to have engaged in an adversary adjudication within the meaning of sec. 203(a)(1) of the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (Supp. III 1985).

An application for an award of attorney's fees and expenses is properly denied where, although the applicant is the prevailing party in an adjudication of trespass charges and related action taken by BLM, BLM's decision to pursue such a course of action was substantially justified by circumstantial evidence pointing to a trespass on public land.

Bureau of Land Management v. David & Bonnie Ericsson, 98 IBLA 258 (July 7, 1987)

GRAZING PERMITS AND LICENSES--Continued

ADJUDICATION--Continued

The Board will affirm a decision of an Administrative Law Judge reversing a BLM decision to modify the apportionment of grazing privileges in a BLM-approved rangeline agreement where the agency decision was not based on a consideration of whether there had been a radical change in circumstances by virtue of the unavailability of associated private land for grazing or other factors which would justify a modification.

BLM properly rejects an application for grazing use within an allotment where grazing is already allocated to a longstanding grazing preference, even though that preference is subject to cancellation because it is no longer supported by appropriate base property, and where BLM affords the holder of that preference an opportunity to apply for the transfer of the preference to other base property.

James E. Briggs v. Bureau of Land Management, John F. Gross, Jr., 99 IBLA 137 (Sept. 25, 1987)

APPEALS

When a range-line agreement between two licensees provides a division of the range will stand until such time as a range study is conducted, and the range study indicates the allotments do not fairly represent the proportion of range lands each party is entitled to on a demand-forage basis, an Administrative Law Judge's decision finding that one of the licensees may be entitled to an adjustment of grazing privileges and remanding the case to BLM to effect an equalization will be affirmed upon appeal.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Lewis M. Webster v. Bureau of Land Management, 97 IBLA 1 (Apr. 16, 1987)

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

Decisions regarding adoption or amendment of resource management plans or management framework plans, which are not subject to administrative review by the Board of Land Appeals, are properly distinguished from decisions adjudicating grazing applications. An appeal from a final BLM decision affirming a proposed decision denying a grazing permittee's application for change in grazing use is properly referred to the Hearings Division of the Office of Hearings and Appeals for assignment to an administrative law judge pursuant to the regulations at 43 CFR 4.470 and 43 CFR 4160.4, notwithstanding the fact BLM based its decision on a planning determination not to amend the relevant plan.

Joel Stamatakis, Steve Stamatakis, 98 IBLA 4 (May 29, 1987)

APPORTIONMENT OF FEDERAL RANGE

Where grazing licensees have executed a valid range-line agreement approved by this Department, such an agreement has generally been treated by the Department as an enforceable contract. Therefore, those terms specifically set forth in the agreement which are unmistakably clear are binding upon the parties unless changed by their mutual consent with BLM's approval.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

The Board will affirm a decision of an Administrative Law Judge reversing a BLM decision to modify the apportionment of grazing privileges in a BLM-approved rangeline agreement where the agency decision was not based on a consideration of whether there had been a radical change in circumstances by virtue of the unavailability of associated private land for grazing or other factors which would justify a modification.

James E. Briggs v. Bureau of Land Management, John F. Gross, Jr., 99 IBLA 137 (Sept. 25, 1987)

GRAZING PERMITS AND LICENSES--Continued

BASE PROPERTY (WATER)

BLM properly rejects an application for grazing use within an allotment where grazing is already allocated to a longstanding grazing preference, even though that preference is subject to cancellation because it is no longer supported by appropriate base property, and where BLM affords the holder of that preference an opportunity to apply for the transfer of the preference to other base property.

James E. Briggs v. Bureau of Land Management, John F. Gross, Jr., 99 IBLA 137 (Sept. 25, 1987)

CANCELLATION OR REDUCTION

Where there has been a decrease in Federal lands available for grazing, BLM may impose a proportionate reduction among all the authorized users of a particular allotment as proportionate reduction is consistent with the reduction required under 43 CFR 4110.4-2(a).

B. G. Bunyard v. Bureau of Land Management, 96 IBLA 143 (Mar. 12, 1987)

BLM properly rejects an application for grazing use within an allotment where grazing is already allocated to a longstanding grazing preference, even though that preference is subject to cancellation because it is no longer supported by appropriate base property, and where BLM affords the holder of that preference an opportunity to apply for the transfer of the preference to other base property.

James E. Briggs v. Bureau of Land Management, John F. Gross, Jr., 99 IBLA 137 (Sept. 25, 1987)

HEARINGS

Decisions regarding adoption or amendment of resource management plans or management framework plans, which are not subject to administrative review by the Board of Land Appeals, are properly distinguished from decisions adjudicating grazing applications. An appeal from a final BLM decision affirming a proposed decision denying a grazing permittee's application for change in grazing use is

HEARINGS--Continued

properly referred to the Hearings Division of the Office of Hearings and Appeals for assignment to an administrative law judge pursuant to the regulations at 43 CFR 4.470 and 43 CFR 4160.4, notwithstanding the fact BLM based its decision on a planning determination not to amend the relevant plan.

Joel Stamatakis, Steve Stamatakis, 98 IBLA 4 (May 29, 1987)

HEARINGS
(See also Administrative Procedure, Federal Land Policy & Management Act of 1976, Geothermal Leases, Grazing Permits & Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act, Rules of Practice, Surface Mining Control & Reclamation Act of 1977, Surface Resources Act, Water Pollution Control--if included in this Index.)

In the absence of a dispute as to a material fact, the due process rights of a Native allotment applicant are satisfied by the right to appeal to the Board of Land Appeals from the reservation of a public use right-of-way for a designated trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982), in the approval of a Native allotment application.

Clarence Lockwood et al., 95 IBLA 261 (Jan. 27, 1987)

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

Norman G. Lavery, 96 IBLA 294 (Mar. 31, 1987)

HEARINGS--Continued

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuangaruak, Mollie Itta, Wilber Ahtuangaruak, 97 IBLA 261 (May 13, 1987)

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

HEARINGS--Continued

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

The Board will not order a further hearing in a mining claim contest where the claimant failed to appear at or participate in the original hearing and, on appeal from a decision declaring his claim null and void for lack of a discovery of a valuable mineral deposit, he has made unsupported allegations but has provided no evidence that a further hearing would produce a different result.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

A hearing is not necessary in the absence of allegations of a material issue of fact, which, if proven, would alter the disposition of the appeal.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

HEARINGS--Continued

Where the record presents unresolved questions of fact as to whether there are adequate reasons supporting BLM's departure from the usual method of apportioning accreted lands, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions.

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

HOMESTEADS (ORDINARY)
(See also Additional Homesteads, Enlarged Homesteads, Reclamation Homesteads, Soldiers' Additional Homesteads, Stock-Raising Homesteads--if included in this Index.)

GENERALLY

Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

APPLICATIONS

When BLM has adjudicated a homestead entry application by allowing it, the rights of the applicant are deemed to relate back to the date of filing of the application and the land embraced by such application is thereby included within an allowed entry. Any applications filed after such date for the same land must be rejected.

John R. Dean, 96 IBLA 239 (Mar. 24, 1987)

HOMESTEADS (ORDINARY)--Continued

CULTIVATION

Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

LANDS SUBJECT TO

An application to make homestead entry on land subject to a properly filed State selection application under the Alaska Statehood Act is properly rejected.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

When BLM has adjudicated a homestead entry application by allowing it, the rights of the applicant are deemed to relate back to the date of filing of the application and the land embraced by such application is thereby included within an allowed entry. Any applications filed after such date for the same land must be rejected.

John R. Dean, 96 IBLA 239 (Mar. 24, 1987)

MILITARY SERVICE

Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into

HOMESTEADS (ORDINARY)--Continued

MILITARY SERVICE--Continued

service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

MINERAL RESERVATION

A patent issued pursuant to the Homestead Act of May 20, 1862, as amended, 43 U.S.C. § 161 (1976), cannot be construed as reserving to the United States minerals not specifically reserved therein.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

RELINQUISHMENT

Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

SECOND ENTRY

Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into

HOMESTEADS (ORDINARY)--Continued

SECOND ENTRY--Continued

service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

INDIAN PROBATE
(See also Appeals, Bureau of Indian Affairs, Hearings, Indians, Rules of Practice--if included in this Index.)

GENERALLY

Confusion and potentially conflicting decisions would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

In the Matter of the Estate of Madeline Bone Wells, 15 IBIA 165 (Apr. 1, 1987)

The Catholic Church is an eligible devisee of Indian trust or restricted property located on the Crow Indian Reservation, Montana.

Estate of Louella Bertha Williams Johnk, 15 IBIA 174 (Apr. 16, 1987)

Under the circumstances of this case, it was error not to seek testimony from the mother of a child born during a marriage when it was alleged that the mother's husband was not the child's father.

Estate of Elmer J. Whipple, 15 IBIA 273 (Sept. 1, 1987)

INDIAN PROBATE--Continued

AGGRIEVED PARTIES

In order to have standing to appeal a decision entered in an Indian probate case, an individual must be an actual or presumptive heir of the decedent, a beneficiary under a will executed by the decedent, or a person asserting a claim against the decedent's estate.

Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (July 9, 1987)

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)

Generally

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that under no set of circumstances can it be entertained, the notice will be addressed without additional briefing.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

The person challenging an Administrative Law Judge's decision in the Departmental probate of a deceased Indian's trust estate bears the burden of proving error.

Estate of Mary Standing Bull Curtis, 15 IBIA 213 (June 12, 1987)

The fact that an Indian probate appeal is pending before the Board of Indian Appeals does not give the Board jurisdiction over an allegedly related Bureau of Indian Affairs decision which has no effect on the decision on appeal.

Estate of Frank Tooahimpah, 15 IBIA 258 (Aug. 10, 1987)

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)--Continued

Matters Considered on Appeal

The Board of Indian Appeals is not required to consider arguments and evidence raised for the first time on appeal.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Estate of Leon Levi Harney, 16 IBIA 18 (Dec. 1, 1987)

Standing to Appeal

A person who fails to file a proper petition for rehearing with the Administrative Law Judge lacks standing to appeal to the Board of Indian Appeals.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

In order to have standing to appeal a decision entered in an Indian probate case, an individual must be an actual or presumptive heir of the decedent, a beneficiary under a will executed by the decedent, or a person asserting a claim against the decedent's estate.

Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (July 9, 1987)

Timely Filing

Under regulations promulgated by the Board of Indian Appeals in Jan. 1981, the effective date for filing a notice of appeal is the date of mailing or of personal delivery.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

INDIAN PROBATE--Continued

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)--Continued

Timely Filing--Continued

Under 43 CFR 4.320(a), a notice of appeal from a denial of rehearing in an Indian probate proceeding must be filed within 60 days from the date of the decision being appealed.

Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (July 9, 1987)

CHILDREN, ILLEGITIMATE (See also INHERITING--if included in this Index.)

Generally

The required proof of paternity in an Indian probate proceeding is a matter of Federal law.

Estate of Joseph Kicking Woman, 15 IBIA 83 (Jan. 14, 1987)

CLAIM AGAINST ESTATE (See also DIVORCE, LIEN, if included in this Index.)

Generally

Bureau of Indian Affairs agency Superintendents are not empowered by 25 CFR 115.11(b) to authorize disbursements from the Individual Indian Money account of a deceased Indian for funeral expenses without the approval of an Administrative Law Judge (Indian Probate).

In the Matter of the Estate of Madeline Bone Wells, 15 IBIA 165 (Apr. 1, 1987)

Care and Support

A general promise of compensation given by an Indian decedent for care and support is not invalid or unenforceable in a Departmental probate proceeding

INDIAN PROBATE--Continued

CLAIM AGAINST ESTATE (See also DIVORCE, LIEN, if included in this Index.)--Continued

Care and Support--Continued

merely because specific sums or terms of compensation are not recited in the promise.

Estate of Mary A. Justine Garrick, 16 IBIA 13 (Nov. 25, 1987)

EVIDENCE

Generally

An affidavit to accompany Indian will executed in accordance with 43 CFR 4.233(a) constitutes prima facie evidence of due execution of the will, and places the burden of proving the will was not duly executed on the will contestants.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Conflicting Testimony

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Insufficiency of

Under the circumstances of this case, it was error not to seek testimony from the mother of a child born during a marriage when it was alleged that the mother's husband was not the child's father.

Estate of Elmer J. Whipple, 15 IBIA 273 (Sept. 1, 1987)

INDIAN PROBATE--Continued

EVIDENCE--Continued

Newly Discovered Evidence

Newly discovered evidence is not a basis for a rehearing unless it is shown that the evidence could not, with diligent effort, have been presented at the original hearing, and unless the evidence is relevant to the matter at issue.

Estate of Joseph Kicking Woman, 15 IBIA 83 (Jan. 14, 1987)

Standing alone, the initial failure to discover evidence and witnesses before the conclusion of the original hearing in an Indian probate proceeding does not justify presentation of that evidence in a rehearing as newly discovered.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

INDIAN LAND CONSOLIDATION ACT

Escheat

Based on the decision of the U.S. Supreme Court in Hodel v. Irving, ____ U.S. ____ , 55 U.S.L.W. 4653 (U.S. May 18, 1987), that the escheat provisions of sec. 207 of the Indian Land Consolidation Act, as originally enacted, 96 Stat. 2519, are unconstitutional, escheats under that section must be disapproved in cases still pending for administrative determination.

Estate of Katie DeLaCruz & Estate of James Herbert Scarborough, 15 IBIA 198 (May 26, 1987)

INDIAN PROBATE--Continued

INDIAN REORGANIZATION ACT of June 18, 1934 (Wheeler-Howard Act) (25 U.S.C. §§ 464-486)

Construction of Section 4

For purposes of 25 U.S.C. § 464 (1982), in order for a tribe to have a property interest in a reservation based on treaty, the modern day "tribe" must be the continuation of a treaty tribe for which the particular reservation was established.

A member of a non-Federally recognized Indian tribe, who is not an heir or lineal descendant of the decedent, and who has less than one-half Indian blood, is found ineligible to receive a devise of Indian trust land on a reservation organized under the Indian Reorganization Act.

Estate of Mary Ann Snohomish Cladoosby, 15 IBIA 203 (June 11, 1987) 94 I.D. 199

INHERITING (See also CHILDREN, ADOPTED; CHILDREN, ILLEGITMATE; WILLS--if included in this Index.)

Generally

Where an Indian will creates life estates in decedent's children, with remainders to the life tenants' "heirs of the body," the life tenants' heirs cannot be determined until the life tenants die.

Estate of Frank Tooahimpah, 15 IBIA 258 (Aug. 10, 1987)

REHEARING (See also ADMINISTRATIVE PROCEDURE, HEARING--if included in this Index.)

Generally

Newly discovered evidence is not a basis for a rehearing unless it is shown that the evidence could not, with diligent effort, have been presented at the original hearing, and unless the evidence is relevant to the matter at issue.

Estate of Joseph Kicking Woman, 15 IBIA 83 (Jan. 14, 1987)

INDIAN PROBATE--Continued

REHEARING (See also ADMINISTRATIVE PROCEDURE, HEARING--if included in this Index.)--Continued

Generally--Continued

A person who fails to file a proper petition for rehearing with the Administrative Law Judge lacks standing to appeal to the Board of Indian Appeals.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

Standing alone, the initial failure to discover evidence and witnesses before the conclusion of the original hearing in an Indian probate proceeding does not justify presentation of that evidence in a rehearing as newly discovered.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

REOPENING

Generally

Because there is no statutory or regulatory proscription against the filing of a petition to reopen a closed Indian probate proceeding after the entry of a Federal court decision or order in the estate, Administrative Law Judges have authority to consider such petitions under 43 CFR 4.242. However, in addition to meeting the standing requirements of 43 CFR 4.242 and showing that the cause of action was pursued with due diligence, the petitioner must also show that the petition is not barred by the entry of the appellate decision.

Estate of Julius Benter (Bender), 15 IBIA 88 (Jan. 21, 1987)

Standing to Petition for Reopening

Because there is no statutory or regulatory proscription against the filing of a petition to reopen a closed Indian probate proceeding after the entry of a Federal court decision or order in the estate, Administrative Law Judges have authority to consider such petitions under 43 CFR 4.242. However, in addition to

INDIAN PROBATE--Continued

REOPENING--Continued

Standing to Petition for Reopening--Continued

meeting the standing requirements of 43 CFR 4.242 and showing that the cause of action was pursued with due diligence, the petitioner must also show that the petition is not barred by the entry of the appellate decision.

Estate of Julius Benter (Bender), 15 IBIA 88 (Jan. 21, 1987)

An adult who participated in the original probate hearing into a deceased Indian's estate lacks standing to petition for reopening.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

SETTLEMENT (See also FAMILY ALLOWANCE AND SETTLEMENT--if included in this Index.)

An agreement by the heir or heirs in an Indian probate proceeding to share trust or restricted property with certain named individuals who are not heirs does not create a right for other non-named individuals to also share in the property, even if the non-named individuals stand in the same relationship to the decedent as the named individuals.

Estate of Mary Lenna Whiteshirt Littlebird Ross, 16 IBIA 4 (Nov. 16, 1987)

STATE LAW

Applicability to Indian Probate, Intestate Estates

When an individual owning land in Indian trust or restricted status dies without a will, the trust property passes to his or her heirs as determined with reference to state laws of intestate succession.

Estate of Sam A. Simeon, Estate of Stephen (Steven Aloysius) Simeon, 15 IBIA 135 (Mar. 20, 1987)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)

Generally

Where an Indian will creates life estates in decedent's children, with remainders to the life tenants' "heirs of the body," the life tenants' heirs cannot be determined until the life tenants die.

Estate of Frank Tooahimpah, 15 IBIA 258 (Aug. 10, 1987)

Failure to Mention Child

Bureau of Indian Affairs instructions to will drafters concerning attesting witnesses and omitted heirs are not Departmental regulations and are advisory only.

The failure of an Indian testator to mention his natural children in his will does not invalidate the will.

Estate of Alexander Charette, 15 IBIA 92 (Jan. 21, 1987)

Insane Delusions

An insane delusion is not merely an erroneous belief, but a belief so unreasonable that it defies rational explanation or justification.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Publication

Publication is not a prerequisite for valid execution of a will conveying Indian trust or restricted property.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)--Continued

Self-proved Wills

An affidavit to accompany Indian will executed in accordance with 43 CFR 4.233(a) constitutes prima facie evidence of due execution of the will, and places the burden of proving the will was not duly executed on the will contestants.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Testamentary Capacity

Generally

The burden of proving lack of testamentary capacity in Indian probate proceedings is on those contesting the will.

The mere recitation of a medical term is not sufficient to prove lack of testamentary capacity in an Indian probate proceeding.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property.

Estate of Leon Levi Harney, 16 IBIA 18 (Dec. 1, 1987)

Undue Influence

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will because of undue influence upon a testator, it must be shown:

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--if included in this Index.)--Continued

Undue Influence--Continued

(1) That he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Leon Levi Harney, 16 IBIA 18 (Dec. 1, 1987)

Witnesses, Attesting

There is no requirement in the regulations or elsewhere that the attesting witnesses to an Indian will be present at the same time or sign in the presence of the testator.

Bureau of Indian Affairs instructions to will drafters concerning attesting witnesses and omitted heirs are not Departmental regulations and are advisory only.

Estate of Alexander Charette, 15 IBIA 92 (Jan. 21, 1987)

WITNESSES

Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

Estate of Joseph Kicking Woman, 15 IBIA 83 (Jan. 14, 1987)

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

INDIANS
(See also Board of Indian Appeals, Bureau of Indian Affairs, Indian Probate--if included in this Index.)

GENERALLY

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that under no set of circumstances can it be entertained, the notice will be addressed without additional briefing.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

An intervenor or joined party cannot maintain a case when the original case or parties are dismissed unless he/she is independently properly before the Board of Indian Appeals.

Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (July 9, 1987)

ALASKA NATIVES

Generally

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

FINANCIAL MATTERS

Generally

Where the Bureau of Indian Affairs has erroneously deposited into a tribal trust account certain judgment fund per capita payments which should have been placed in Individual Indian Money accounts for two minor members of the tribe, and the funds are still in the tribal account, the tribe should repay the amounts it

INDIANS--Continued

FINANCIAL MATTERS--Continued

Generally--Continued

received in error, so that accounts may be established for the minors.

The Bureau of Indian Affairs must be able to show by convincing evidence that it deposited judgment fund per capita payments belonging to minor members of a tribe into a tribal trust account before the tribe is obligated to repay the funds.

Kaibab Band of Paiute Indians v. Acting Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 277 (Sept. 25, 1987)

Individual Indian Money Accounts

Where the Bureau of Indian Affairs has erroneously deposited into a tribal trust account certain judgment fund per capita payments which should have been placed in Individual Indian Money accounts for two minor members of the tribe, and the funds are still in the tribal account, the tribe should repay the amounts it received in error, so that accounts may be established for the minors.

Kaibab Band of Paiute Indians v. Acting Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 277 (Sept. 25, 1987)

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Generally

An Indian tribe dealing with the Government under the Indian Self-Determination and Education Assistance Act is not required to be, or to become, expert in the Bureau of Indian Affairs' complex budgetary scheme. It is BIA's responsibility to see that its administrative requirements are satisfied, and it cannot properly shift that responsibility to the Indian contractor.

BIA regulations implementing the Indian Self-Determination and Education Assistance Act provide that proposed contract modifications by an Indian contractor are to be submitted to the contracting officer for

INDIANS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

approval. If he approves them, the contractor is entitled to rely on that approval, even if BIA later decides that the approval was improper, provided the approval was not clearly contrary to law.

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and where BIA's own contracting officer failed to recognize the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedure in 25 CFR Part 271.

Sec. 106(h) of the Indian Self-Determination Act, 25 U.S.C. § 450j(h) (1982), does not preclude the use of program funds to pay costs incurred by the Bureau of Indian Affairs in monitoring and providing technical assistance for a contract under the Act.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987) 94 I.D. 120

On reconsideration, the Board concludes that since the contract before it contains no termination for convenience clause and since the Government did not establish that it met the requirements of any other clause permitting modification or termination of the contract, the requirements of the contract were not met, and the contractor is entitled to recover in full

INDIANS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

the expenses it incurred in performing its work under the contract.

Appeal of Navajo Community College (On Reconsideration), IBCA-1834 (May 8, 1987)

JUDGMENT FUNDS

Where the Bureau of Indian Affairs has erroneously deposited into a tribal trust account certain judgment fund per capita payments which should have been placed in Individual Indian Money accounts for two minor members of the tribe, and the funds are still in the tribal account, the tribe should repay the amounts it received in error, so that accounts may be established for the minors.

The Bureau of Indian Affairs must be able to show by convincing evidence that it deposited judgment fund per capita payments belonging to minor members of a tribe into a tribal trust account before the tribe is obligated to repay the funds.

Kaibab Band of Paiute Indians v. Acting Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 277 (Sept. 25, 1987)

LANDS

Allotments

Alienation

Approval of conveyances of Indian trust or restricted land is committed to the discretion of the Bureau of Indian Affairs. In reviewing such approvals, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that

INDIANS--Continued

LANDS--Continued

Allotments--Continued

Alienation--Continued

proper consideration has been given to all legal prerequisites to the exercise of discretion.

Theodore B. White v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 142 (Mar. 27, 1987)

Allotments on Public Domain

Generally

Although neither sec. 4 of the General Allotment Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982), nor the Indian allotment regulations at 43 CFR Part 2530, specifically provide for the cancellation of a certificate of allotment, the Secretary of the Interior, as custodian of the public lands, may cancel such a certificate where he finds that the allottee has not complied with the requirements for issuance of a patent.

James Leland Wallace, 100 IBLA 70 (Nov. 30, 1987)

Lands Subject to

BLM properly rejects an application for an Indian allotment filed pursuant to sec. 4 of the Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982), where, at the time the application was filed, the land was segregated, in accordance with 43 CFR 2711.1-2(d), from appropriation under the public land laws by publication in the Federal Register of notice of realty action offering the land for sale.

Frank F. Salsedo, 99 IBLA 170 (Oct. 2, 1987)

INDIANS--Continued

LANDS--Continued

Allotments on Public Domain--Continued

Settlement

Under regulation 43 CFR 2091.5, authorized officers will determine by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by persons other than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

An Indian seeking an Indian allotment in Alaska under the Act of Feb. 8, 1887, has not established settlement under the Act or demonstrated sufficient use and possession to prevent the segregative effect of a grazing lease from attaching by settlement efforts consisting of brief visits to the vicinity of the allotment lands, one extended 30-day stay in the vicinity of the allotment lands, and insubstantial improvements on the land.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

Where BLM has classified certain lands for disposal under sec. 4 of the General Allotment Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), and issued a certificate of allotment, it may establish a reasonable time in which the allottee must demonstrate settlement of the land in question. Two years from issuance of the certificate is such a reasonable time.

Where lands are classified for disposal under sec. 4 of the General Allotment Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), as irrigable lands and a certificate of allotment issued, settlement of those lands must include acts to establish the allottee's good faith and intention to, in fact, irrigate and cultivate crops on the land in question.

James Leland Wallace, 100 IBLA 70 (Nov. 30, 1987)

INDIANS--Continued

LANDS--Continued

Fair Rental Value

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982) must be made in accordance with generally accepted principles governing the determination of market value.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982), which is supported by documentation in the administrative record, will not be overturned unless it is shown to be unreasonable.

Navajo Nation v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987) 94 I.D. 172

Rights-of-Way

In regulations set forth at 25 CFR Part 169, the Secretary of the Interior has required tribal consent for any right-of-way across tribal land.

Under 25 CFR 169.19, prior written tribal consent is required for the renewal of a right-of-way across tribal lands.

Northern Natural Gas v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 124 (Mar. 2, 1987)

Federal statutes concerning rights-of-way over tribal lands, and concerning tribal lands generally, evidence congressional intent to vest Indian tribes with power to control the use of their own lands.

INDIANS--Continued

LANDS--Continued

Rights-of-Way--Continued

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

Where 25 CFR 169.20 provides for the termination of a right-of-way for nonuse for a consecutive 2-year period for the purpose for which the right-of-way was granted, no provision of statute, regulation, or the right-of-way documents authorized the Bureau of Indian Affairs to excuse involuntary nonuse without the consent of the tribe.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

Tribal Lands

Federal statutes concerning rights-of-way over tribal lands, and concerning tribal lands generally, evidence congressional intent to vest Indian tribes with power to control the use of their own lands.

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

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Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

INDIANS--Continued

LEASES AND PERMITS

Amendments

Where a lease of Indian land requires the unanimous consent of the lessors for changes affecting the entitlement of lessors to rent, the Bureau of Indian Affairs may not approve a document purporting to effect such a change, which is signed only by a majority of the lessors.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

Development Leases

Where a lease of Indian land requires the unanimous consent of the lessors for changes affecting the entitlement of lessors to rent, the Bureau of Indian Affairs may not approve a document purporting to effect such a change, which is signed only by a majority of the lessors.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

Rental Rates

The role of the Board of Indian Appeals in reviewing a rental adjustment in a lease of Indian land is to determine whether the adjustment is reasonable, that is, whether it is supported by law and substantial evidence. If it is reasonable, the Board will not substitute its judgment for that of the Bureau of Indian Affairs, but the Board must overturn an adjustment that is not reasonable.

A rental adjustment which applies the percentage increase in fair annual rental between two lease periods to a negotiated rent which was nearly twice the amount of the fair annual rental at the time it was negotiated is not reasonable.

Frank Gamble v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 101 (Feb. 5, 1987)

INDIANS--Continued

LEASES AND PERMITS--Continued

Rental Rates--Continued

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982) must be made in accordance with generally accepted principles governing the determination of market value.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982), which is supported by documentation in the administrative record, will not be overturned unless it is shown to be unreasonable.

Navajo Nation v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987) 94 I.D. 172

A rental adjustment to a lease of Indian land, which is based on an appraisal employing a sales-price comparison methodology, will be affirmed if it is reasonable, that is, if it is supported in law and by substantial evidence.

Kelly Oil Co. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 249 (Aug. 5, 1987)

TRIBAL GOVERNMENT

Constitutions, Bylaws, and Ordinances

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body.

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

An ambiguous notice provision in an ordinance concerning the removal of tribal officials from office should be interpreted to require that reasonable

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

notice be provided to the official whose removal is sought.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 105 (Feb. 12, 1987)

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

The Board of Indian Appeals has authority to interpret tribal law in order to review decisions made by the Bureau of Indian Affairs.

Menominee Tribal Enterprises v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 263 (Aug. 12, 1987)

Officers

An ambiguous notice provision in an ordinance concerning the removal of tribal officials from office should be interpreted to require that reasonable notice be provided to the official whose removal is sought.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 105 (Feb. 12, 1987)

A tribal official who received adequate notice of tribal proceedings to remove him/her from office but who failed to exhaust tribal remedies may not challenge the tribal proceedings in a Department of the Interior forum.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 9 (Nov. 19, 1987)

INTERVENTION

An intervenor or joined party cannot maintain a case when the original case or parties are dismissed unless he/she is independently properly before the Board of Indian Appeals.

Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (July 9, 1987)

LACHES

A grazing licensee's right to request an adjustment of grazing privileges under a range-line agreement will not be barred by laches if the facts show that there has been no lack of diligence in asserting the claim.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

MATERIALS ACT

When subsequent to execution of a mineral material sales contract, the Department has amended the regulation providing for automatic termination of such a contract for failure to submit an in lieu of minimum annual production payment on or before the anniversary date by giving the authorized officer discretionary authority to terminate, the Board will set aside a BLM decision holding the contract to have automatically terminated and remand the case to BLM to allow the exercise of its discretion.

T. Brown Constructors, Inc., 95 IBLA 107 (Jan. 6, 1987)

MATERIALS ACT--Continued

When a party has been found to be in trespass as a result of having removed sand and gravel from lands patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), the party must comply with the provisions of 43 CFR 9239.0-9(c) in order to qualify for purchase of additional sand and gravel from the Government. If the party does comply, BLM has the discretion to sell additional sand and gravel to the trespasser pursuant to the provisions of sec. 1 of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1982), and its implementing regulations.

If, subsequent to giving notice that a party is in trespass when removing sand and gravel from lands in which the Government has retained all minerals, BLM agrees to allow the mining operations to continue while negotiating a settlement of the issue of trespass damages, the continued operations should not be considered as willful trespass unless and until the operator is given notice that the mining operations should cease.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

A determination to not waive a breach of contract for sales of mineral materials will not be overturned absent a showing that the determination is arbitrary, capricious, or not in the best interest of the Federal Government.

T. Brown Constructors, Inc., 98 IBLA 1 (May 28, 1987)

MILLSITES
(See also Mining Claims--if included in this Index.)

GENERALLY

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite claim abandoned and void without first according the claimant an opportunity to comply with a notice of deficiency.

Red Top Mercury Mines, Inc., 96 IBLA 391 (Apr. 14, 1987)

MILLSITES--Continued

GENERALLY--Continued

Under 43 CFR 3833.4(b), the failure of a holder of a mill or tunnel site claim to timely file an annual notice of intention to hold the claim is a curable defect. However, this regulation applies only to those documents not specifically required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). The holder of an unpatented placer or lode mining claim cannot rely on this regulation to cure his failure to timely file a notice of intention to hold the mining claim, because the requirement to file annual documents for a lode or placer mining claim is a statutory requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Wilbur H. Stark, 98 IBLA 254 (July 7, 1987)

MINERAL LANDS
(See also Mining Claims--if included in this Index.)

MINERAL RESERVATION

Removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

A decision approving a bond filed by a mineral claimant of reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed when the owner of the surface estate failed to file objections to issuance of the bond pursuant to 43 CFR 3814.1(d), notwithstanding the fact that the surface owner has filed a civil complaint against the mineral claimant and intends to initiate a private contest against the mineral claimant.

Visintainer Sheep Co., 97 IBLA 63 (Apr. 27, 1987)

MINERAL LANDS--Continued

MINERAL RESERVATION--Continued

As provided by 43 CFR 3811.2-9, lands patented with mineral reservations to the United States under the Taylor Grazing Act, 43 U.S.C. § 315g (1970), are subject to appropriation under the mining or mineral leasing laws for the reserved minerals.

Edward Lore, 97 IBLA 340 (May 21, 1987)

Amax Specialty Metals Corp., 100 IBLA 60 (Nov. 24, 1987)

A patent issued pursuant to the Homestead Act of May 20, 1862, as amended, 43 U.S.C. § 161 (1976), cannot be construed as reserving to the United States minerals not specifically reserved therein.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

NONMINERAL ENTRIES

Prior to passage of sec. 905(a)(3) of the Alaska National Interest Lands Conservation Act of 1980, 43 U.S.C. § 1634(a)(3) (1982), lands containing valuable deposits of gravel were considered to be mineral lands unavailable for Native allotment.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

A patent issued pursuant to the Homestead Act of May 20, 1862, as amended, 43 U.S.C. § 161 (1976), cannot be construed as reserving to the United States minerals not specifically reserved therein.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

MINERAL LEASING ACT
(See also Bureau of Land Management, Coal Leases & Permits, Geothermal Leases, Oil & Gas Leases, Phosphate Leases & Permits, Potassium Leases & Permits, Sodium Leases & Permits--if included in this Index.)

ROYALTIES

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(b) (1982), requires continued operation of a lease that has achieved diligent development. However, the requirement may be suspended upon application and payment of advance royalties. The failure to make advance royalty payments in lieu of continued operation subjects the lease to cancellation.

Western Slope Carbon, Inc., 98 IBLA 198 (June 29, 1987)

When the mineral lease provides for such determination, the Minerals Management Service may properly determine to value zinc concentrates sold, for royalty purposes, on the basis of the highest price which the lessee would pay or receive pursuant to a contract with an unaffiliated supplier or buyer, if the contract under which the concentrates are actually sold is not a bona fide arm's-length transaction between independent parties.

AMAX Lead Co. of Missouri (On Reconsideration), 99 IBLA 313 (Oct. 29, 1987)

The Department is authorized to reduce the royalty rate on a lease reinstated pursuant to sec. 401 of the Federal Oil and Gas Royalty Management Act at a higher royalty rate where "there are uneconomic or other circumstances which could cause undue hardship." 30 U.S.C. § 188(i)(2) (1982). Where the lessee has offered evidence that a reinstated competitive lease was extended by drilling over the lease expiration date, that a producing well was subsequently completed, and that the well will never reach payout, a decision rejecting a petition without applying the statutory criteria will be set aside and remanded for further consideration.

Alta Energy Corp., 100 IBLA 313 (Dec. 28, 1987)

MINING CLAIMS
(See also Hearings, Millsites, Mineral Lands, Multiple Mineral Development Act, Surface Resources Act--if included in this Index.)

GENERALLY

Where appellant provides support for a contention that the refiling of a mining claim location made subsequent to a withdrawal of the land upon which the claim was located was an amended location of a prior claim embracing the same land rather than a new relocation, a decision declaring the claim null and void will be remanded for further review. In determining the sufficiency of an amended claim, the original location notice and the amended notice must be construed together, and if sufficient when so construed, the location will be valid.

Estate of Van Dolah, 95 IBLA 132 (Jan. 7, 1987)

If lands have been withdrawn from mineral entry the owner of a mining claim must demonstrate that the claims he owns were located prior to withdrawal. In doing so he must also demonstrate a chain of title running from the locator to him.

Mascot Mining, Inc., 95 IBLA 328 (Jan. 30, 1987)

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

Norman G. Lavery, 96 IBLA 294 (Mar. 31, 1987)

Where a mining partnership fails to show that access to its mining claims will be affected by a BLM decision not to reserve a right of public access across lands conveyed to a Native corporation, the BLM decision will be affirmed.

Mespelt & Almasy Mining Co., 99 IBLA 25 (Aug. 26, 1987)

MINING CLAIMS--Continued

GENERALLY--Continued

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

The issue of the validity of a mining claim is the ultimate concern of the Department when a patent application has been made, and the Department necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law.

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

"Good faith." Good faith in the location of mining claims is widely recognized as an implicit requirement of the mining laws. When a question of

MINING CLAIMS--Continued

GENERALLY--Continued

good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims, the issue is appropriately left to resolution by judicial proceedings between the locators. However, "good faith" may also concern a locator's knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

In order to have a valid mining claim, a mining claimant must have found a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a valuable mine.

The prudent man standard is an objective standard which requires a claimant to submit proof that a prudent man would develop a mine. It is not enough that a claimant desires to do so if the evidence leads to a conclusion that a prudent man would not. This proof can be made using the testimony of expert witnesses who examine the property and express their expert opinion that the evidence supports a determination that a prudent man would be justified in the expenditure of his time and means with the reasonable prospect of success in the development of a valuable mine.

The issues of quantity and quality of mineral present on a mining claim are issues of fact. Once the evidence of quantity and quality has been presented, it must also be shown there is a reasonable prospect that those minerals can be removed and rendered suitable for sale at a cost which is less than the sales price of the product.

Final proof of actual mining costs can only be ascertained after the conduct of an actual mining operation. However, a claimant may demonstrate the reasonably anticipated cost of mining, by use of reliable cost-analysis systems or by use of a comparison to an operative mine. These anticipated costs are a reasonable basis for a determination by a person of ordinary prudence regarding whether the further expenditure of his time and means is justified.

MINING CLAIMS--Continued

GENERALLY--Continued

The law of discovery does not require a guaranteed success, but only requires a reasonable prospect of success in developing a valuable mine.

The obvious intent of Congress when making public lands available to people for the purpose of mining valuable mineral deposits was to reward and encourage the discovery of minerals that are valuable in the economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. There must, therefore, be a showing of the existence of potential buyers of the product and the price they would be willing to pay.

A mining claimant has satisfied the marketability test if it is shown that a market for the product presently exists, that there is a ready and willing buyer, and that the claimant can mine and sell the locatable material from the claims in the marketplace at a competitive or lower price than the present suppliers. A claimant need not have a firm commitment for the purchase and sale of his mine product.

The common varieties legislation (30 U.S.C. § 611 (1982)), removed "common varieties" of sand, stone, gravel, and the like from the operation of the general mining laws. In determining whether there is a discovery of locatable mineral, the uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals from the claim may not be considered when predicting profitability. Sales of an allegedly uncommon variety of limestone must reflect the limestone's special value. This special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in the marketplace price. If the limestone is sold for "common variety" use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.

When an exposure of valuable locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can

MINING CLAIMS--Continued

GENERALLY--Continued

reasonably contemplate operations on a series of contiguous claims.

In the early stages of development of any mine it is rare for the miner to have an assured market for his product or an assurance that when the mine is developed the price paid for his product will be equal to or higher than the market price in existence on the date he commences development. This fact does not render the claim invalid for lack of a discovery. A claimant need only demonstrate by a preponderance of the evidence that there is a reasonable prospect that when developed he will possess a profitable mine.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

ABANDONMENT

Although BLM may properly declare mining claims abandoned on the basis of a state court decision on the rights of rival claimants to possession, it should not do so until the state appellate court review process is complete.

Alvin L. Kile, Leslie L. Maxwell, 97 IBLA 6 (Apr. 17, 1987)

In the case of a mining claim located prior to Oct. 21, 1976, the failure to file one of the instruments required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), on or before Oct. 22, 1979, and prior to Dec. 31 of every year thereafter in the proper BLM office conclusively constitutes abandonment of the mining claim by the owner and renders the claim void.

Steve E. Cate, 97 IBLA 27 (Apr. 23, 1987)

MINING CLAIMS--Continued

ABANDONMENT--Continued

The owner of a mining claim located after Oct. 21, 1976, is required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), to file a notice of intention to hold the claim or evidence of assessment work performed on the claim, in the county where the location notice is of record and in the proper office of BLM prior to Dec. 31 of each year following the calendar year in which the claim is located. Failure to file the instrument required by the statute constitutes an abandonment of the claim.

With respect to an unpatented mining claim located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either a notice of intention to hold the claim or evidence of assessment work both in the local recording office where the notice of location is recorded and in the proper office of BLM prior to Dec. 31 of the year following the calendar year in which the claim was located, as required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Oliver B. Kilroy, 99 IBLA 33 (Aug. 31, 1987)

Where a mining claimant inadvertently omits the name and serial number of unpatented mining claims from the notice of intention to hold and there is no other means of identifying the claims on the document, BLM properly declares the claims abandoned and void for failure to comply with 43 CFR 3833.2. Although a filing may be supplemented by subsequent submission of information not required by statute without a statutory presumption of abandonment, there is no authority for amendment of the notice of intention to hold to include a previously omitted claim after the filing deadline.

Ethel Bilotte, 99 IBLA 159 (Sept. 29, 1987)

MINING CLAIMS--Continued

ASSESSMENT WORK

Where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30.

Ronald Willden, 97 IBLA 40 (Apr. 23, 1987)

A party seeking judicial review of a Departmental decision holding the party's mining claim to be abandoned and void for failure to satisfy the requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), need not continue to satisfy the annual filing requirements of sec. 314 while judicial review is in progress.

J. L. Block, 98 IBLA 209 (July 1, 1987)

COMMON VARIETIES OF MINERALS

Generally

In order to establish a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone, sand and gravel, cinders, and certain other materials are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously

MINING CLAIMS--Continued

COMMON VARIETIES OF MINERALS--Continued

Generally--Continued

thereafter up to and including the time of a contest hearing.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

Special Value

The common varieties legislation (30 U.S.C. § 611 (1982)), removed "common varieties" of sand, stone, gravel, and the like from the operation of the general mining laws. In determining whether there is a discovery of locatable mineral, the uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals from the claim may not be considered when predicting profitability. Sales of an allegedly uncommon variety of limestone must reflect the limestone's special value. This special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in the marketplace price. If the limestone is sold for "common variety" use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

CONTESTS

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined the land within a claim and found the quantity and quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

United States v. Norman A. Whittaker, 95 IBLA 271 (Jan. 29, 1987)

MINING CLAIMS--Continued

CONTESTS--Continued

Although BLM may properly declare mining claims abandoned on the basis of a state court decision on the rights of rival claimants to possession, it should not do so until the state appellate court review process is complete.

Alvin L. Kile, Leslie L. Maxwell, 97 IBLA 6 (Apr. 17, 1987)

BLM may properly dismiss, with prejudice, a patent application with respect to association oil shale placer mining claims where such claims were properly declared null and void in earlier Government contest proceedings when the applicant's predecessors-in-interest failed to timely file answers to successive complaints, which together resulted in service by registered mail upon all of the co-owners of the claims. It was not necessary that the interests of all of the contestees be declared null and void in a single proceeding.

The owner of an oil shale placer mining claim will be regarded as having been properly served with notice of a Government contest complaint when that person actually received a copy of the complaint challenging the validity of the claim, even though there was a minor error in the name of the contestee on the complaint and a copy of the complaint was not sent to the post office nearest the claim, in accordance with the applicable rules, paragraph 6 of Circular No. 460, 44 L.D. 573 (1916).

Assuming the applicability of rule 8 of the Rules of Practice (51 L.D. 549 (1926)) to Government contests, such a contest challenging the validity of an oil shale placer mining claim will not be held to have abated pursuant to that rule where the Government failed to serve one of the co-owners of the claim named in the contest complaint. At best, the contest will be deemed to have abated only as to the unserved contestee.

Union Oil Co. of California, 98 IBLA 37 (June 3, 1987)

MINING CLAIMS--Continued

CONTESTS--Continued

BLM may not properly reject a plan of operations for a mining claim on the basis that the claim was declared null and void in 1956 when the claimant failed to answer the contest complaint, where the record shows that BLM failed to serve a copy of the complaint on the person who actually owned the claim at the time the complaint was issued, and, thus, the contest was a nullity.

Patsy A. Brings, 98 IBLA 385 (Aug. 5, 1987)

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim, and, based upon his examination, concludes the quantity and quality of the minerals is insufficient to support a finding of discovery, a prima facie case is established.

Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit will not overcome a prima facie case that there is no discovery.

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of

MINING CLAIMS--Continued

CONTESTS--Continued

discovery of a valuable mineral deposit within the claims.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

The Board will not order a further hearing in a mining claim contest where the claimant failed to appear at or participate in the original hearing and, on appeal from a decision declaring his claim null and void for lack of a discovery of a valuable mineral deposit, he has made unsupported allegations but has provided no evidence that a further hearing would produce a different result.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a

MINING CLAIMS--Continued

CONTESTS--Continued

settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

A Government contest complaint which asserts the invalidity of a claim because of insufficient quantity and quality of the located mineral within the limits of the claim does not put into issue the existence of excess reserves within the limits of the claim.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

DETERMINATION OF VALIDITY

BLM may properly require a mineral locator to supply a description of the location of his claim to within a quarter section if this information has not been provided with the filing of a location notice. A locator's failure to properly record a claim may result in a determination that it has been abandoned and is therefore void. However, a locator's failure to file a map or the information required by the regulations is a curable defect, and BLM must notify the claimant and provide an opportunity to supply the information before declaring the claim abandoned and void.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

A locator is not required to submit to BLM a precise description of the position of his claims. The test as to whether a recorded description is sufficient is whether the claim may in fact be found and identified by following the recorded description. Because the information provided to BLM is not required to be precise, the uses which may be made of it necessarily depend upon its relative accuracy. Information provided by a locator may be sufficient to meet the statutory requirement yet be insufficient to support a determination that the claim is null and void for being located on previously patented, withdrawn, or reserved land.

United States Borax & Chemical Co., 98 IBLA 358 (July 31, 1987)

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

The issue of the validity of a mining claim is the ultimate concern of the Department when a patent application has been made, and the Department necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law.

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment,

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

"Good faith." Good faith in the location of mining claims is widely recognized as an implicit requirement of the mining laws. When a question of good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims, the issue is appropriately left to resolution by judicial proceedings between the locators. However, "good faith" may also concern a locator's knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

In order to establish a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

The holding of a mining claim solely as a reserve for speculative future development does not impart validity to the claim.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim, minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Louis Wolk, 100 IBLA 167 (Dec. 3, 1987)

For a lode mining claim there must be an exposure of mineral in place within the boundaries of the claim. Without an exposure of mineral in place there can be no discovery on a lode mining claim even though all other elements of discovery have been satisfied. If the land is withdrawn from mineral entry, it must be shown that the mineral in place had been exposed prior to the date of withdrawal.

In order to have a valid mining claim, a mining claimant must have found a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his

time and means with a reasonable prospect of success in the development of a valuable mine.

The prudent man standard is an objective standard which requires a claimant to submit proof that a prudent man would develop a mine. It is not enough that a claimant desires to do so if the evidence leads to a conclusion that a prudent man would not. This proof can be made using the testimony of expert witnesses who examine the property and express their expert opinion that the evidence supports a determination that a prudent man would be justified in the expenditure of his time and means with the reasonable prospect of success in the development of a valuable mine.

Final proof of actual mining costs can only be ascertained after the conduct of an actual mining operation. However, a claimant may demonstrate the reasonably anticipated cost of mining, by use of reliable cost-analysis systems or by use of a comparison to an operative mine. These anticipated costs are a reasonable basis for a determination by a person of ordinary prudence regarding whether the further expenditure of his time and means is justified.

The law of discovery does not require a guaranteed success, but only requires a reasonable prospect of success in developing a valuable mine.

The obvious intent of Congress when making public lands available to people for the purpose of mining valuable mineral deposits was to reward and encourage the discovery of minerals that are valuable in the economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. There must, therefore, be a showing of the existence of potential buyers of the product and the price they would be willing to pay.

A mining claimant has satisfied the marketability test if it is shown that a market for the product presently exists, that there is a ready and willing buyer, and that the claimant can mine and sell the locatable material from the claims in the marketplace at a competitive or lower price than the present

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

suppliers. A claimant need not have a firm commitment for the purchase and sale of his mine product.

The common varieties legislation (30 U.S.C. § 611 (1982)), removed "common varieties" of sand, stone, gravel, and the like from the operation of the general mining laws. In determining whether there is a discovery of locatable mineral, the uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals from the claim may not be considered when predicting profitability. Sales of an allegedly uncommon variety of limestone must reflect the limestone's special value. This special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in the marketplace price. If the limestone is sold for "common variety" use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.

When an exposure of valuable locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can reasonably contemplate operations on a series of contiguous claims.

In the early stages of development of any mine it is rare for the miner to have an assured market for his product or an assurance that when the mine is developed the price paid for his product will be equal to or higher than the market price in existence on the date he commences development. This fact does not render the claim invalid for lack of a discovery. A claimant need only demonstrate by a preponderance of the evidence that there is a reasonable prospect that when developed he will possess a profitable mine.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone, sand and gravel, cinders, and certain other materials are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

The lack of evidence of prior sales of cinders from a claim is not conclusive on the issue of marketability. However, where the evidence shows that exploitation of cinders from the claim and the market for such cinders, with the exception of use by the state highway authority without compensation to claimants, was extremely limited at the time of the withdrawal of common varieties of cinders in 1955, a conclusion after a hearing that there was no market for the cinders which would justify a person of reasonable prudence in expending his time and money to develop a paying mine will be affirmed.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

DISCOVERY

Generally

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

United States v. Norman A. Whittaker, 95 IBLA 271 (Jan. 29, 1987)

DISCOVERY--Continued

Generally--Continued

When a mining claim has properly been declared null and void for lack of discovery, a subsequent quitclaim deed from the claimant to a third party conveys nothing as the grantor has no interest which may be conveyed.

Vivian L. Ames et al., 99 IBLA 99 (Sept. 21, 1987)

Evidence of the existence of mineralization which may encourage further exploration to determine the existence of minerals of such quality and quantity as would justify the expenditure of funds for the development of a mine does not establish the discovery of a valuable mineral deposit.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim, minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the

"marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

United States v. Louis Wolk, 100 IBLA 167 (Dec. 3, 1987)

For a lode mining claim there must be an exposure of mineral in place within the boundaries of the claim. Without an exposure of mineral in place there can be no discovery on a lode mining claim even though all other elements of discovery have been satisfied. If the land is withdrawn from mineral entry, it must be shown that the mineral in place had been exposed prior to the date of withdrawal.

In order to have a valid mining claim, a mining claimant must have found a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a valuable mine.

The prudent man standard is an objective standard which requires a claimant to submit proof that a prudent man would develop a mine. It is not enough that a claimant desires to do so if the evidence leads to a conclusion that a prudent man would not. This proof can

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

be made using the testimony of expert witnesses who examine the property and express their expert opinion that the evidence supports a determination that a prudent man would be justified in the expenditure of his time and means with the reasonable prospect of success in the development of a valuable mine.

The issues of quantity and quality of mineral present on a mining claim are issues of fact. Once the evidence of quantity and quality has been presented, it must also be shown there is a reasonable prospect that those minerals can be removed and rendered suitable for sale at a cost which is less than the sales price of the product.

Final proof of actual mining costs can only be ascertained after the conduct of an actual mining operation. However, a claimant may demonstrate the reasonably anticipated cost of mining, by use of reliable cost-analysis systems or by use of a comparison to an operative mine. These anticipated costs are a reasonable basis for a determination by a person of ordinary prudence regarding whether the further expenditure of his time and means is justified.

The law of discovery does not require a guaranteed success, but only requires a reasonable prospect of success in developing a valuable mine.

The common varieties legislation (30 U.S.C. § 611 (1982)), removed "common varieties" of sand, stone, gravel, and the like from the operation of the general mining laws. In determining whether there is a discovery of locatable mineral, the uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals from the claim may not be considered when predicting profitability. Sales of an allegedly uncommon variety of limestone must reflect the limestone's special value. This special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in the marketplace price. If the limestone is sold for "common variety" use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.

When an exposure of valuable locatable mineral in place has been shown to exist within the boundaries of

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can reasonably contemplate operations on a series of contiguous claims.

In the early stages of development of any mine it is rare for the miner to have an assured market for his product or an assurance that when the mine is developed the price paid for his product will be equal to or higher than the market price in existence on the date he commences development. This fact does not render the claim invalid for lack of a discovery. A claimant need only demonstrate by a preponderance of the evidence that there is a reasonable prospect that when developed he will possess a profitable mine.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

Geologic Inference

Though geologic inference can be used, where exposures exist which show high and relatively consistent values, to infer sufficient quantity and quality of similar mineralization beyond the actual exposed areas such that a valuable mineral deposit may be said to exist, resort to geologic inference cannot be justified on the basis of data which is shown to be intrinsically flawed.

United States v. Norman A. Whittaker, 95 IBLA 271 (Jan. 29, 1987)

Marketability

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

is a reasonable likelihood of success that a paying mine can be developed.

United States v. Norman A. Whittaker, 95 IBLA 271 (Jan. 29, 1987)

In order to establish a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

The holding of a mining claim solely as a reserve for speculative future development does not impart validity to the claim.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

The issues of quantity and quality of mineral present on a mining claim are issues of fact. Once the evidence of quantity and quality has been presented, it must also be shown there is a reasonable prospect that those minerals can be removed and rendered suitable for sale at a cost which is less than the sales price of the product.

The obvious intent of Congress when making public lands available to people for the purpose of mining valuable mineral deposits was to reward and encourage the discovery of minerals that are valuable in the economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation

MINING CLAIMS--Continued

DISCOVERY--Continued

Marketability--Continued

are hardly economically valuable. There must, therefore, be a showing of the existence of potential buyers of the product and the price they would be willing to pay.

A mining claimant has satisfied the marketability test if it is shown that a market for the product presently exists, that there is a ready and willing buyer, and that the claimant can mine and sell the locatable material from the claims in the marketplace at a competitive or lower price than the present suppliers. A claimant need not have a firm commitment for the purchase and sale of his mine product.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone, sand and gravel, cinders, and certain other materials are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

The lack of evidence of prior sales of cinders from a claim is not conclusive on the issue of marketability. However, where the evidence shows that exploitation of cinders from the claim and the market for such cinders, with the exception of use by the state highway authority without compensation to claimants, was extremely limited at the time of the withdrawal of common varieties of cinders in 1955, a conclusion after a hearing that there was no market for the cinders which would justify a person of reasonable prudence in expending his time and money to develop a paying mine will be affirmed.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

MINING CLAIMS--Continued

ENVIRONMENT

A finding that a proposed uranium mining operation will not have a significant impact on the human environment and, therefore, that no environmental impact statement is required, will be affirmed on appeal when the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize environmental impacts.

Southwest Resource Council, 96 IBLA 105 (Mar. 10, 1987) 94 I.D. 56

HEARINGS

The Board will not order a further hearing in a mining claim contest where the claimant failed to appear at or participate in the original hearing and, on appeal from a decision declaring his claim null and void for lack of a discovery of a valuable mineral deposit, he has made unsupported allegations but has provided no evidence that a further hearing would produce a different result.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

A Government contest complaint which asserts the invalidity of a claim because of insufficient quantity and quality of the located mineral within the limits of the claim does not put into issue the existence of excess reserves within the limits of the claim.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

LANDS SUBJECT TO

"Notation rule." Where an Alaska Native corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

rejected or withdrawn. However, where such an application is irregular on its face in that the land selected is not legally subject to such selection under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

In the absence of a Master Title Plat or other appropriate land-use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected lands from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation rule as a bar to mining claims located during the pendency of the regional selection.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

As provided by 43 CFR 3811.2-9, lands patented with mineral reservations to the United States under the Taylor Grazing Act, 43 U.S.C. § 315g (1970), are subject to appropriation under the mining or mineral leasing laws for the reserved minerals.

Edward Lore, 97 IBLA 340 (May 21, 1987)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Amax Specialty Metals Corp., 100 IBLA 60 (Nov. 24, 1987)

Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

Kenneth Carter, 98 IBLA 100 (June 12, 1987)

Land acquired by the United States does not become public land by the mere process of its acquisition and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Ted Thompson, 98 IBLA 251 (July 7, 1987)

Mining claims located on lands withdrawn for reclamation purposes under the first form are null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Frank David Hill, 99 IBLA 16 (Aug. 14, 1987)

Lands withdrawn from entry under some or all of the public land laws remain withdrawn until there is a formal revocation or modification of the order of withdrawal. Where a public land order withdrawing lands from location of mining claims for metalliferous minerals is expressly amended by a subsequent public land order deleting certain lands from the withdrawal, a decision declaring mining claims located thereafter

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

for precious metals on lands deleted from the withdrawal to be null and void ab initio will be reversed.

Harry J. Ayala, 99 IBLA 19 (Aug. 17, 1987)

Mining claims located on lands subject to a valid, ongoing, and pre-existing material-site right-of-way granted to the State of Nevada pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

Russell Avery & Douglas E. Noland, 99 IBLA 22 (Aug. 25, 1987)

When a mining claim has properly been declared null and void for lack of discovery, a subsequent quitclaim deed from the claimant to a third party conveys nothing as the grantor has no interest which may be conveyed.

Vivian L. Ames et al., 99 IBLA 99 (Sept. 21, 1987)

BLM properly declares a mining claim null and void ab initio and rejects a mineral patent application therefor when the evidence establishes the claim was located prior to revocation of a first-form reclamation withdrawal.

Lynn H. Grooms et al., 99 IBLA 237 (Oct. 19, 1987)

The standard for distinguishing under the Pickett Act whether a mineral deposit is metalliferous or nonmetalliferous is that if the deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal, which is extracted and used in the trades as such, the deposit is metalliferous. If the minerals contained in the deposit contain metals but are

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

extracted and used mainly in the form of compounds with other elements, the deposit is nonmetalliferous.

David E. Hoover & Lester F. Whalley, 99 IBLA 291 (Oct. 26, 1987)

Mining claims located on land unavailable for location and entry under the mining laws are null and void ab initio.

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land.

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are subject to location under the mining laws when Congress has expressly authorized mineral location of reserved minerals in the legislation providing for the reservation. Sec. 8 of the Taylor Grazing Act, 43 U.S.C. § 315g(d) (1970).

A mining claim located on land which had been subject to the final approval of a list of state-selected land is properly declared null and void ab initio.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

A mineral patent application does not segregate land from the acquisition of competing rights.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

LITIGATION

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching

MINING CLAIMS--Continued

LITIGATION--Continued

its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

LOCATION

A mining claim located on land withdrawn or reserved from mineral location is null and void ab initio; however, the side and end lines of a lode claim may extend onto withdrawn land for the purpose of defining extralateral rights to veins or lodes which apex within the claim, although the locator does not thereby acquire rights to use the surface of the withdrawn land and may or may not acquire rights to the minerals underneath.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

If lands have been withdrawn from mineral entry the owner of a mining claim must demonstrate that the claims he owns were located prior to withdrawal. In doing so he must also demonstrate a chain of title running from the locator to him.

Mascot Mining, Inc., 95 IBLA 328 (Jan. 30, 1987)

MINING CLAIMS--Continued

LOCATION--Continued

The "date of location" of a mining claim is "the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel site is situated." 43 CFR 3833.0-5(h). Absent clear evidence to the contrary in a specific case, under Alaska State law the date of location of a mining claim is the date notice is posted on the claim as recited in the recorded certificate of location.

While failure to record a mining claim as required by State law does not, in and of itself, render the claim invalid, other events, such as a withdrawal or classification of the land by the United States, prior to any corrective action by the claimant, may operate as an adverse right which will make the claim invalid.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under Utah law, the date of location is that date specified in the notice of location posted on the mining claim and in the copy of the notice of location filed with the county recorder's office.

Kerry Shumway, 99 IBLA 156 (Sept. 25, 1987)

BLM properly declares a mining claim null and void ab initio and rejects a mineral patent application therefor when the evidence establishes the claim was located prior to revocation of a first-form reclamation withdrawal.

Lynn H. Grooms et al., 99 IBLA 237 (Oct. 19, 1987)

"Good faith." Good faith in the location of mining claims is widely recognized as an implicit requirement of the mining laws. When a question of good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims, the issue is appropriately left to resolution by judicial proceedings between the locators. However, "good faith" may also concern a locator's knowledge and

MINING CLAIMS--Continued

LOCATION--Continued

purposes in attempting to obtain rights to Federal lands by establishing mining claims.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

An amended location notice generally relates back to the date of the original location notice. A location notice cannot be considered an amended location, so as to relate back to a location which predates a withdrawal, to the extent such location notice describes new land not embraced in the original location.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

LODE CLAIMS

A mining claim located on land withdrawn or reserved from mineral location is null and void ab initio; however, the side and end lines of a lode claim may extend onto withdrawn land for the purpose of defining extralateral rights to veins or lodes which apex within the claim, although the locator does not thereby acquire rights to use the surface of the withdrawn land and may or may not acquire rights to the minerals underneath.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

A mining claim cannot be declared null and void ab initio for the reason that the claimant failed to perfect his location by performing a condition precedent set forth in the order opening the land to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), where that condition precedent is no longer required at the time BLM adjudicates the claim.

Fred G. Welker, 99 IBLA 297 (Oct. 27, 1987)

MINING CLAIMS--Continued

LODE CLAIMS--Continued

For a lode mining claim there must be an exposure of mineral in place within the boundaries of the claim. Without an exposure of mineral in place there can be no discovery on a lode mining claim even though all other elements of discovery have been satisfied. If the land is withdrawn from mineral entry, it must be shown that the mineral in place had been exposed prior to the date of withdrawal.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

MARKETABILITY

In order to establish a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

The obvious intent of Congress when making public lands available to people for the purpose of mining valuable mineral deposits was to reward and encourage the discovery of minerals that are valuable in the economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. There must, therefore, be a showing of the existence of potential buyers of the product and the price they would be willing to pay.

A mining claimant has satisfied the marketability test if it is shown that a market for the product presently exists, that there is a ready and willing buyer, and that the claimant can mine and sell the locatable material from the claims in the marketplace at a competitive or lower price than the present

MINING CLAIMS--Continued

MARKETABILITY--Continued

suppliers. A claimant need not have a firm commitment for the purchase and sale of his mine product.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

MILLSITES

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite claim abandoned and void without first according the claimant an opportunity to comply with a notice of deficiency.

Red Top Mercury Mines, Inc., 96 IBLA 391 (Apr. 14, 1987)

PATENT

BLM may properly dismiss, with prejudice, a patent application with respect to association oil shale placer mining claims where such claims were properly declared null and void in earlier Government contest proceedings when the applicant's predecessors-in-interest failed to timely file answers to successive complaints, which together resulted in service by registered mail upon all of the co-owners of the claims. It was not necessary that the interests of all of the contestees be declared null and void in a single proceeding.

Union Oil Co. of California, 98 IBLA 37 (June 3, 1987)

Mining claims located on land unavailable for location and entry under the mining laws are null and void ab initio.

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are subject to location under the mining laws when Congress has expressly authorized mineral location of reserved minerals in the

MINING CLAIMS--Continued

PATENT--Continued

legislation providing for the reservation. Sec. 8 of the Taylor Grazing Act, 43 U.S.C. § 315g(d) (1970).

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

The issue of the validity of a mining claim is the ultimate concern of the Department when a patent application has been made, and the Department necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

PLACER CLAIMS

A mining claim cannot be declared null and void ab initio for the reason that the claimant failed to perfect his location by performing a condition precedent set forth in the order opening the land to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), where that condition precedent is no longer required at the time BLM adjudicates the claim.

Fred G. Welker, 99 IBLA 297 (Oct. 27, 1987)

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

PLAN OF OPERATIONS

BLM may properly reject a proposed modification of an approved plan of operations, seeking to engage in open pit mining within a wilderness study area, where the record establishes that the proposed operation would impair the naturalness of the study area. In addition, BLM may properly require the mining

MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

claimant to undertake reclamation of any area affected by unauthorized mining operations.

L. C. Artman et al., 98 IBLA 164 (June 24, 1987)

The surface management regulations at 43 CFR Subpart 3809 implement the mandate of sec. 302(b) of the Federal Land Policy and Management Act of 1976 to manage the public lands to prevent unnecessary and undue degradation. A decision of BLM requiring a mining claimant to operate under an approved plan of operations on the basis that mining operations would cause a cumulative surface disturbance in excess of 5 acres during a calendar year will be affirmed where appellant fails to sustain the burden of showing that 5 acres or less is involved. Although the regulations governing reclamation of disturbed areas permit deferral of reclamation for legitimate mining purposes, unreclaimed surface disturbance from a prior year's operation is properly included in the acreage computation for purposes of determining whether a plan of operations is required.

Differential Energy, Inc., 99 IBLA 225 (Oct. 16, 1987)

Where a hearing into the availability for use of a water supply for a mining operation located within a wilderness study area has previously been held and a final decision rendered on the question, and such determination is dispositive of the question of the feasibility of the plans of mining operations under review, no further factfinding is required.

Approval of mining plans of operations for a cyanide leaching operation may be properly rescinded where the plans are shown to have been approved in error because an assumption was made that an adequate supply of water was available which did not in fact exist.

Far West Exploration, Inc., 100 IBLA 306 (Dec. 28, 1987)

MINING CLAIMS--Continued

POSSESSORY RIGHT

Under the provisions of 30 U.S.C. § 38 (1982), the holding and working of a claim for the period of time equal to the State's statute of limitations is the legal equivalent of proofs of acts of location, recording, and transfer. This provision does not, however, alter other requirements of the mining laws, such as the necessity of a discovery or limitations on acreage which may be taken up in a claim.

Vivian L. Ames et al., 99 IBLA 99 (Sept. 21, 1987)

Under the provisions of 30 U.S.C. § 38 (1982), the holding and working of a claim for the period of time equal to the State's statute of limitations is the legal equivalent of proofs of acts of location, recording, and transfer. "Holding and working" a claim requires more than the mere performance of assessment work, and is only established where claimants have maintained actual, open, and exclusive possession of the claim for the term of the local statute of limitations for adverse possession of real estate. Evidence of exploitation of the mineral deposit by parties other than the claimants without permission from or compensation to the claimants will preclude such a finding.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

RECORDATION

BLM is not estopped from declaring an unpatented mining claim located prior to Oct. 21, 1976, abandoned and void for failure to file a copy of an affidavit of assessment work or a notice of intention to hold the claim with BLM on or before Oct. 22, 1979, because BLM has delayed issuing such a declaration for a number of years.

John Robert Maytag, 95 IBLA 128 (Jan. 6, 1987)

MINING CLAIMS--Continued

RECORDATION--Continued

The Bureau of Land Management may not reject the filing of a notice of location that was filed before the lands upon which the mining claim was located were the subject of an interim conveyance.

Eskil Anderson, 95 IBLA 253 (Jan. 23, 1987)

BLM may properly require a mineral locator to supply a description of the location of his claim to within a quarter section if this information has not been provided with the filing of a location notice. A locator's failure to properly record a claim may result in a determination that it has been abandoned and is therefore void. However, a locator's failure to file a map or the information required by the regulations is a curable defect, and BLM must notify the claimant and provide an opportunity to supply the information before declaring the claim abandoned and void.

A mining claimant is not required to submit to BLM information sufficiently precise for his claim to be projected onto a township plat. Neither the statute nor the regulations requires a precise map or description of the position of a claim. The test established by statute for the sufficiency of a recorded description is whether the claim may in fact be found and identified on the ground by following the information provided. This is a factual question and unless the description or map is on its face so deficient as to be inadequate as a matter of law, the issue of its sufficiency can be determined only by testing the information in the field.

Because a recorded description and the map filed with BLM are not required to be precise, the uses which may be made of information submitted necessarily depend upon its relative accuracy. If accurate, a map will show the position of a claim in relation to landmarks or the legal boundaries of the public land survey, and may permit BLM to determine that the land on which the claim is located has been withdrawn. But a map is useful only to the extent it accurately represents the territory and claim mapped.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

MINING CLAIMS--Continued

RECORDATION--Continued

An unpatented mining claim must be deemed abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), where there is no evidence that an instrument of recordation and an initial affidavit of assessment work or notice of intention to hold the claim was filed within the 3-year period following Oct. 21, 1976, by the purported owner of the claim, a predecessor in interest, or an agent.

Mascot Mining, Inc., 95 IBLA 328 (Jan. 30, 1987)

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed on or before Dec. 30, 1981, under sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1982), will not be overcome by proof that BLM mishandled evidence of annual assessment work filed during the 1984 calendar year.

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of any calendar year following the first filing of such evidence or notice.

Not every document filed with BLM from which intent might be inferred is sufficient to meet the statutory and regulatory requirements for notices of intention to hold mining claims. Such a document must be filed as a notice of intent and meet those requirements.

Red Top Mercury Mines, Inc., 96 IBLA 391 (Apr. 14, 1987)

Although BLM may properly declare mining claims abandoned on the basis of a state court decision on the rights of rival claimants to possession, it should not do so until the state appellate court review process is complete.

Alvin L. Kile, Leslie L. Maxwell, 97 IBLA 6 (Apr. 17, 1987)

MINING CLAIMS--Continued

RECORDATION--Continued

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of the year following the year in which the claim was located, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982).

Ronald Willden, 97 IBLA 40 (Apr. 23, 1987)

BLM may properly declare an unpatented mining claim abandoned and void and reject the recordation of affidavits of assessment work where the owner of the claim failed to file a copy of the notice of location for the claim timely with BLM, pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982).

C. Bert Sanger Trust, 97 IBLA 356 (May 26, 1987)

A locator is not required to submit to BLM a precise description of the position of his claims. The test as to whether a recorded description is sufficient is whether the claim may in fact be found and identified by following the recorded description. Because the information provided to BLM is not required to be precise, the uses which may be made of it necessarily depend upon its relative accuracy. Information provided by a locator may be sufficient to meet the statutory requirement yet be insufficient to support a determination that the claim is null and void for being located on previously patented, withdrawn, or reserved land.

United States Borax & Chemical Co., 98 IBLA 358 (July 31, 1987)

MINING CLAIMS--Continued

RECORDATION--Continued

The owner of mining claims located after Oct. 21, 1976, must file copies of the notices of location of the claims with BLM within 90 days of the dates of location of the claims, failing which the claims are properly declared abandoned and void.

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under Utah law, the date of location is that date specified in the notice of location posted on the mining claim and in the copy of the notice of location filed with the county recorder's office.

Kerry Shumway, 99 IBLA 156 (Sept. 25, 1987)

RELOCATION

Where appellant provides support for a contention that the refiling of a mining claim location made subsequent to a withdrawal of the land upon which the claim was located was an amended location of a prior claim embracing the same land rather than a new relocation, a decision declaring the claim null and void will be remanded for further review. In determining the sufficiency of an amended claim, the original location notice and the amended notice must be construed together, and if sufficient when so construed, the location will be valid.

Estate of Van Dolah, 95 IBLA 132 (Jan. 7, 1987)

An amended location notice generally relates back to the date of the original location notice. A location notice cannot be considered an amended location, so as to relate back to a location which predates a withdrawal, to the extent such location notice describes new land not embraced in the original location.

United States v. Leroy S. Johnson et al., 1CO IBLA 322 (Dec. 31, 1987)

MINING CLAIMS--Continued

SPECIAL ACTS

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982).

Thomas L. Lee, 98 IBLA 149 (June 22, 1987)

A mining claim cannot be declared null and void ab initio for the reason that the claimant failed to perfect his location by performing a condition precedent set forth in the order opening the land to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), where that condition precedent is no longer required at the time BLM adjudicates the claim.

Fred G. Welker, 99 IBLA 297 (Oct. 27, 1987)

SPECIFIC MINERAL(S) INVOLVED

Pozzolan

Pozzolan is a nonmetalliferous mineral.

David E. Hoover & Lester F. Whalley, 99 IBLA 291 (Oct. 26, 1987)

SURFACE USES

Application of the "unnecessary or undue degradation" standard presumes the validity of the use which is causing the impact and seeks to determine whether the impact is greater than should be expected to occur if the activity were conducted by a prudent operator in the usual, customary, and proficient conduct of similar operations.

When BLM determines, after such notice and opportunity for hearing as may be required by due process, that a mining claim is not supported by a discovery of a valuable mineral deposit, it may declare that mining

MINING CLAIMS--Continued

SURFACE USES--Continued

claim null and void and reject a proposed plan of operations submitted for that claim.

Southwest Resource Council, 96 IBLA 105 (Mar. 10, 1987) 94 I.D. 56

A decision approving a bond filed by a mineral claimant of reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed when the owner of the surface estate failed to file objections to issuance of the bond pursuant to 43 CFR 3814.1(d), notwithstanding the fact that the surface owner has filed a civil complaint against the mineral claimant and intends to initiate a private contest against the mineral claimant.

Visintainer Sheep Co., 97 IBLA 63 (Apr. 27, 1987)

TUNNEL SITES

Under 43 CFR 3833.4(b), the failure of a holder of a mill or tunnel site claim to timely file an annual notice of intention to hold the claim is a curable defect. However, this regulation applies only to those documents not specifically required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). The holder of an unpatented placer or lode mining claim cannot rely on this regulation to cure his failure to timely file a notice of intention to hold the mining claim, because the requirement to file annual documents for a lode or placer mining claim is a statutory requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Wilbur H. Stark, 98 IBLA 254 (July 7, 1987)

WITHDRAWN LAND

Where appellant provides support for a contention that the refiling of a mining claim location made subsequent to a withdrawal of the land upon which the claim was located was an amended location of a prior claim embracing the same land rather than a new relocation, a decision declaring the claim null and

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

void will be remanded for further review. In determining the sufficiency of an amended claim, the original location notice and the amended notice must be construed together, and if sufficient when so construed, the location will be valid.

Estate of Van Dolah, 95 IBLA 132 (Jan. 7, 1987)

A mining claim located on land withdrawn or reserved from mineral location is null and void ab initio; however, the side and end lines of a lode claim may extend onto withdrawn land for the purpose of defining extralateral rights to veins or lodes which apex within the claim, although the locator does not thereby acquire rights to use the surface of the withdrawn land and may or may not acquire rights to the minerals underneath.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

If lands have been withdrawn from mineral entry the owner of a mining claim must demonstrate that the claims he owns were located prior to withdrawal. In doing so he must also demonstrate a chain of title running from the locator to him.

Mascot Mining, Inc., 95 IBLA 328 (Jan. 30, 1987)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

Kenneth Carter, 98 IBLA 100 (June 12, 1987)

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982).

Thomas L. Lee, 98 IBLA 149 (June 22, 1987)

Lands withdrawn from entry under some or all of the public land laws remain withdrawn until there is a formal revocation or modification of the order of withdrawal. Where a public land order withdrawing lands from location of mining claims for metalliferous minerals is expressly amended by a subsequent public land order deleting certain lands from the withdrawal, a decision declaring mining claims located thereafter for precious metals on lands deleted from the withdrawal to be null and void ab initio will be reversed.

Harry J. Ayala, 99 IBLA 19 (Aug. 17, 1987)

BLM properly declares a mining claim null and void ab initio and rejects a mineral patent application therefor when the evidence establishes the claim was located prior to revocation of a first-form reclamation withdrawal.

Lynn H. Grooms et al., 99 IBLA 237 (Oct. 19, 1987)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

The standard for distinguishing under the Pickett Act whether a mineral deposit is metalliferous or nonmetalliferous is that if the deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal, which is extracted and used in the trades as such, the deposit is metalliferous. If the minerals contained in the deposit contain metals but are extracted and used mainly in the form of compounds with other elements, the deposit is nonmetalliferous.

David E. Hoover & Lester F. Whalley, 99 IBLA 291 (Oct. 26, 1987)

For a lode mining claim there must be an exposure of mineral in place within the boundaries of the claim. Without an exposure of mineral in place there can be no discovery on a lode mining claim even though all other elements of discovery have been satisfied. If the land is withdrawn from mineral entry, it must be shown that the mineral in place had been exposed prior to the date of withdrawal.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

Publication of the notice of a withdrawal application in the Federal Register segregates the lands described in the application from settlement, sale, location, or entry under the general land laws, including the mining laws, to the extent specified in the notice.

A lode claim located on land segregated and closed to mineral entry by publication of notice of an application for withdrawal of the land in the Federal Register is properly declared null and void ab initio.

Coeur Explorations, Inc., 100 IBLA 293 (Dec. 22, 1987)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

An amended location notice generally relates back to the date of the original location notice. A location notice cannot be considered an amended location, so as to relate back to a location which predates a withdrawal, to the extent such location notice describes new land not embraced in the original location.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
(See also Environmental Policy Act--if included in this Index.)

GENERALLY

A finding that the grant of a right-of-way does not constitute a major Federal action significantly affecting the quality of the human environment will be upheld where the agency has identified and considered the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant or, if there is significant impact, that changes in the project have sufficiently minimized such impact.

California Wilderness Coalition et al., 98 IBLA 314 (July 30, 1987)

ENVIRONMENTAL STATEMENTS

A range improvement project is subject to the requirement that an environmental assessment be prepared. If a salient aspect of a project has not been assessed and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared.

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A decision that a proposed action does not require preparation of an environmental impact statement will be affirmed if

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

it appears to have been made by an authorized officer in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of the officer's study of such a record.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

A finding that a proposed uranium mining operation will not have a significant impact on the human environment and, therefore, that no environmental impact statement is required, will be affirmed on appeal when the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize environmental impacts.

A regional environmental impact statement is required in only two instances: (1) when there is a comprehensive Federal plan for the development of a region, and (2) when various Federal actions in a region have cumulative or synergistic impacts on a region.

Southwest Resource Council, 96 IBLA 105 (Mar. 10, 1987) 94 I.D. 56

When BLM has adopted a staged leasing program and notifies a potential geothermal lessee that all post-lease plans for exploration and development are subject to site-specific environmental review, and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result, it is not necessary to prepare an environmental impact statement prior to leasing.

Union Oil Co. of California, 99 IBLA 95 (Sept. 17, 1987)

NAVIGABLE WATERS

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

NOTICE

GENERALLY

The Department is obligated to mail a copy of orders, instructions, or notices to the lessee of record under 43 CFR 3162.3 when such documents are served upon the operator designated by the lessee to engage in the actual conduct of operations on the leasehold.

Exxon Corp., 95 IBLA 165 (Jan. 13, 1987)

The Bureau of Land Management may properly reject an over-the-counter noncompetitive oil and gas lease offer when special stipulations are not executed and filed with it within the time limit specified.

William H. Kerlin, Jr., 95 IBLA 377 (Feb. 19, 1987)

The Department has long followed the rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. A party may defeat application of the rule by showing error in Postal Service

NOTICE--Continued

GENERALLY--Continued

procedure amounting to negligence in transmitting the decision.

J-O'B Operating Co., 97 IBLA 89 (Apr. 28, 1987)

BLM may properly dismiss, with prejudice, a patent application with respect to association oil shale placer mining claims where such claims were properly declared null and void in earlier Government contest proceedings when the applicant's predecessors-in-interest failed to timely file answers to successive complaints, which together resulted in service by registered mail upon all of the co-owners of the claims. It was not necessary that the interests of all of the contestees be declared null and void in a single proceeding.

The owner of an oil shale placer mining claim will be regarded as having been properly served with notice of a Government contest complaint when that person actually received a copy of the complaint challenging the validity of the claim, even though there was a minor error in the name of the contestee on the complaint and a copy of the complaint was not sent to the post office nearest the claim, in accordance with the applicable rules, paragraph 6 of Circular No. 460, 44 L.D. 573 (1916).

Assuming the applicability of rule 8 of the Rules of Practice (51 L.D. 549 (1926)) to Government contests, such a contest challenging the validity of an oil shale placer mining claim will not be held to have abated pursuant to that rule where the Government failed to serve one of the co-owners of the claim named in the contest complaint. At best, the contest will be deemed to have abated only as to the unserved contestee.

Union Oil Co. of California, 98 IBLA 37 (June 3, 1987)

A BLM decision to assess liquidated damages and civil penalties for failure to comply with a written order of an authorized BLM officer will be reversed where the record does not establish that the lessee was served with the order prior to the assessment of liquidated damages pursuant to 43 CFR 3163.3(a) and

NOTICE--Continued

GENERALLY--Continued

prior to the assessment of civil penalties pursuant to 43 CFR 3163.4-1.

Robert C. Anderson Oil Properties, 98 IBLA 82 (June 10, 1987)

BLM may properly require an applicant under sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), to publish a notice of his application, in accordance with 43 CFR 2541.5, regardless of any prior publication pursuant to state law in connection with a tax sale of the property sought.

Robert E. Richards, 98 IBLA 153 (June 23, 1987)

BLM may not properly reject a plan of operations for a mining claim on the basis that the claim was declared null and void in 1956 when the claimant failed to answer the contest complaint, where the record shows that BLM failed to serve a copy of the complaint on the person who actually owned the claim at the time the complaint was issued, and, thus, the contest was a nullity.

Patsy A. Brings, 98 IBLA 385 (Aug. 5, 1987)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

CONSTRUCTIVE NOTICE

The Department has long followed the rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. A party may defeat application of the rule by showing error in Postal Service

NOTICE--Continued

CONSTRUCTIVE NOTICE--Continued

procedure amounting to negligence in transmitting the decision.

J-O'B Operating Co., 97 IBLA 89 (Apr. 28, 1987)

OFFICERS AND EMPLOYEES
(See also Federal Employees & Officers--if included in this Index.)

The presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

OIL AND GAS

PIPELINES

Rights-of-Ways

Departmental precedent and regulations establish that sec. 28 of the Mineral Leasing Act of 1920, as amended, provides the proper authority for issuance of pipeline rights-of-way for transportation of gas produced from Federal oil and gas leases. Where the pipeline is constructed off-lease, this is true regardless of whether the pipeline facility is characterized as a gathering line or production facility on the one hand or a pipeline for transportation of gas to market on the other hand. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982), authorizing rights-of-way for "natural gas" pipelines provides the proper statutory authority for a right-of-way for a pipeline to transport all component gases produced from a well on Federal oil and gas leases, including a pipeline exclusively devoted to transportation of carbon dioxide subsequently separated from the other components of the

OIL AND GAS--Continued

PIPELINES--Continued

Rights-of-Ways--Continued

gas stream emanating from the wellhead. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Exxon Corp., 97 IBLA 45 (Apr. 23, 1987) 94 I.D. 139

OIL AND GAS LEASES
(See also Mineral Leasing Act, Outer Continental Shelf Lands Act--if included in this Index.)

GENERALLY

The Department is obligated to mail a copy of orders, instructions, or notices to the lessee of record under 43 CFR 3162.3 when such documents are served upon the operator designated by the lessee to engage in the actual conduct of operations on the leasehold.

Where 43 CFR 3163.3(a) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Exxon Corp., 95 IBLA 165 (Jan. 13, 1987)

The Bureau of Land Management may properly reject an over-the-counter noncompetitive oil and gas lease offer when special stipulations are not executed and filed with it within the time limit specified.

William H. Kerlin, Jr., 95 IBLA 377 (Feb. 19, 1987)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

Lands which are not within a known geological structure of a producing oil or gas field, or a favorable petroleum geological province in Alaska, which have been previously leased are subject to leasing only under the regulations at 43 CFR Subpart 3112. Those regulations provide that lands which have been offered and for which no applications have been received during the filing period are available for leasing by an over-the-counter lease offer.

Michigan Oil Co., 96 IBLA 1 (Feb. 25, 1987)

An oil and gas lease offer for less than 640 acres or one full section, whichever is larger, is properly rejected, unless the offer includes all available lands within a section and there are no contiguous lands available for lease.

New Mexico & Arizona Land Co., 96 IBLA 178 (Mar. 18, 1987)

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to have all meters functioning properly, and assess liquidated damages under 43 CFR 3163.3(a) for failure to timely comply with that notice by calibrating the meters. The $250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to shorten meter hoses in order to prevent the collection of fluid in low spots, and assess liquidated damages under 43 CFR 3163.3(a) for failure to comply with that notice. The $250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly require an oil and gas lessee to construct a berm around a tank in which produced water is stored, because BLM is authorized by Departmental regulations to issue instructions or orders relating to the protection of environmental quality. However, such a requirement may not be based upon a condition in the lessee's application for permit to drill requiring the construction of firewalls around tank batteries since a firewall is a wall to retain oil in case of its

OIL AND GAS LEASES--Continued

GENERALLY--Continued

escape from a tank or to prevent the spread of burning oil.

William Perlman, 96 IBLA 181 (Mar. 18, 1987)

If the terms of a Federal-State cooperative agreement entered into pursuant to 43 U.S.C. § 1352 (1982), provide that an oil and gas lease issued by the Federal Government is to be issued and administered pursuant to Federal laws, Federal laws and regulations pertaining to release of confidential information will apply. If a decision to release such information comports with Federal law the release of the information is not a breach of discretionary authority.

Shell Western Exploration & Production, Inc., 96 IBLA 244 (Mar. 24, 1987)

The Board will affirm BLM's dismissal of a protest of an oil and gas lease sale where the protestant's allegations that the winning bidder enjoyed an unfair advantage and that BLM was remiss in its duties in conducting the sale are unsupported by the record.

Chevron U.S.A. Inc., 96 IBLA 272 (Mar. 26, 1987)

Departmental regulations at 43 CFR Part 3160 governing onshore oil and gas operations apply to facilities located on private leases which participate with Federal and/or Indian leases under a unit agreement approved by the Department's authorized officer. Accordingly, a unit operator is required to submit site facility diagrams of facilities located on such private leases under 43 CFR 3162.7-4(d)(1) to aid BLM in accounting for production and royalties allocated to the Federal and/or Indian leases.

Tricentrol United States, Inc., 97 IBLA 387 (May 27, 1987)

OIL AND GAS LEASES--Continued

GENERALLY--Continued

On appeal from an assessment for failure to timely abate an incident of noncompliance (INC), the assessment will be affirmed where the INC is found to be proper and it is undisputed the operator did not achieve compliance within the time allowed. An inquiry of the Bureau of Land Management regarding the propriety of the INC will not ordinarily justify a failure to timely abate in the absence of a timely request for administrative review of the INC coupled with a request for suspension or a request for extension of time to comply.

Timberline Production Co., 98 IBLA 188 (June 26, 1987)

ACQUIRED LANDS LEASES

BLM must cancel a noncompetitive oil and gas lease of acquired lands where the lessee failed to fully pay the first year's advance rental at the time of submission of his lease offer, in accordance with 43 CFR 3103.3-1 (1979), the deficiency was more than 10 percent and a subsequent lease offer was filed by a qualified third party.

Sun Exploration & Production Co., 95 IBLA 140 (Jan. 12 1987)

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and priority among them is determined by drawing in accordance with 43 CFR 1821.2-3.

Roberts & Koch, 95 IBLA 239 (Jan. 16, 1987)

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer to the extent that it covers acquired military lands formerly included in an oil and gas lease which was relinquished. Lands formerly embraced within oil and gas leases that have been relinquished, to the extent they are subject

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

to noncompetitive leasing, must be leased pursuant to the simultaneous filing procedures at 43 CFR Subpart 3112.

A detailed reevaluation to determine if the lands are within a known geologic structure is a statutory prerequisite to leasing acquired military lands within the City of Corpus Christi, Texas, pursuant to the Act of Oct. 19, 1984, P.L. 98-529, 98 Stat. 2697. A noncompetitive lease may not be issued for such lands where there is no indication in the record that such an evaluation has been performed.

Robert D. Bluntzer, 95 IBLA 247 (Jan. 23, 1987)

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. A noncompetitive over-the-counter lease offer for acquired lands which correctly describes the lands as described in the Declaration of Taking, but includes a description of the land by course and distance which is incorrect, is properly rejected since the incorrect description renders the face of the offer subject to corrections absent which the lease could not issue.

Henry P. Ellsworth, 97 IBLA 74 (Apr. 28, 1987)

OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 3111.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

An applicant seeking a noncompetitive oil and gas lease for acquired lands who challenges a determination by BLM that land is within a known geological structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error. The Board of Land Appeals may properly consider data compiled both before and after a KGS determination in reviewing the merits of such determination.

Carolyn J. McCutchin, 99 IBLA 29 (Aug. 26, 1987)

BLM may properly designate lands as within a known geologic structure (KGS) of a producing oil or gas field even though such lands are not underlain by a dome or anticline. Lands underlain by stratigraphic traps of oil or gas may properly be designated as KGS lands, and such lands may be leased only by competitive bidding.

Carol Ann Hoffman, 100 IBLA 139 (Dec. 2, 1987)

OIL AND GAS LEASES--Continued

APPLICATIONS

Generally

The failure to date the signature on an over-the-counter oil and gas lease offer is not a per se disqualification of the offeror and a decision rejecting an offer on this basis is properly reversed.

Henry W. Odlozil, Sr., 96 IBLA 286 (Mar. 30, 1987)

The Department has long followed the rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. A party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

J-O'B Operating Co., 97 IBLA 89 (Apr. 28, 1987)

The drawing of an oil and gas lease applicant's name under the simultaneous leasing system does not create any property or contract right in the party whose name is drawn, but merely establishes the priority for purposes of filing a noncompetitive lease offer. It creates only a right to have the application fairly considered under the applicable statutory criteria. Timely return of executed lease forms and payment of the first year's rental constitutes an offer to lease. An offer to lease is not accepted until the lease forms are signed by the authorized BLM officer.

Shaw Resources, Inc., et al., 98 IBLA 96 (June 12, 1987)

Where a record is shown, by a preponderance of the evidence, to be insufficient to support a BLM decision extending a KGS, the determination is reversed.

Richard E. O'Connell, 98 IBLA 283 (July 20, 1987)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

Departmental regulation 43 CFR 3111.1-1(a), requires that an over-the-counter noncompetitive oil and gas lease offer be made on a current form approved by the Director, or on unofficial copies of that form in current use. Copies must be exact reproductions on one page of both sides of the official-approved form and must be manually signed in ink and dated by the offeror or the offeror's duly authorized agent or attorney in fact. An original and two signed copies of each offer to lease must be filed in the proper BLM office. An oil and gas lease offer which is not properly filed in accordance with these requirements must be rejected pursuant to 43 CFR 3111.1-1(f).

New Mexico & Arizona Land Co., 99 IBLA 190 (Oct. 13, 1987)

Where a simultaneous noncompetitive oil and gas lease applicant uses as its mailing address a post office box rented and exclusively controlled by officers of a lease filing service, the applicant is merely using an alternate address for the service, in violation of 43 CFR 3112.2-1(b), which bars the use on the application of the address of any entity which is in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

Where a simultaneous noncompetitive oil and gas lease applicant violates 43 CFR 3112.2-1(b) by using a post office box rented and exclusively controlled by officers of a lease filing service, it has failed to submit an application that would qualify it to receive an oil an gas lease, and administrative cancellation of a lease issued pursuant to the application is required.

SATELLITE 8309119, 99 IBLA 301 (Oct. 27, 1987)

SATELLITE 8307138, SATELLITE 8309175, 99 IBLA 307 (Oct. 27, 1987)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Generally--Continued

If an appellant fails to tender the first year's rental and filing fee when appealing from a decision that a simultaneous oil and gas lease application is unacceptable, the appeal will be dismissed for failure to comply with 43 CFR 3112.3(h). If, however, the first year's rental and filing fee have previously been tendered, and have not been refunded at the time of filing a notice of appeal, the previous submittal will suffice.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

An oil and gas lease application must be rejected pursuant to 43 CFR 3112.2-1(d) (1982) (currently 43 CFR 3112.2-1(b)), where the applicant used a mailing address which was used by another person or entity in the business of providing assistance to those participating in the simultaneous oil and gas leasing system and the record shows that the same mailing address was used as a common address for collecting applicants' and others' mail as a mail-forwarding box within the access and control of the person involved in providing the assistance in oil and gas lease filings.

Big Horn Partnership & Red Desert Partnership, 100 IBLA 20 (Nov. 19, 1987)

Attorneys-in-Fact or Agents

Where it is clear from the record that the person signing a simultaneous oil and gas lease offer on behalf of a corporation is a duly authorized corporate officer, compliance is established with the requirements of the regulation at 43 CFR 3102.4 notwithstanding the fact the signing officer was identified as an attorney-in-fact.

Lear Petroleum Exploration, Inc., 95 IBLA 304 (Jan. 30, 1987)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Attorneys-in-Fact or Agents--Continued

The attorney-in-fact regulation, 43 CFR 3112.6-1(b)(1), prohibits an attorney-in-fact from executing a lease offer under the simultaneous leasing procedures, 43 CFR Subpart 3112, for one party when he is authorized to file offers as an attorney-in-fact for another. It specifically requires that a power-of-attorney document expressly prohibit the attorney-in-fact from filing offers on behalf of any other participant. If a person whose power of attorney contains the prohibition signs a lease offer on behalf of another party, he violates the terms of his power of attorney.

Texaco Inc., 95 IBLA 397 (Feb. 24, 1987)

Where a simultaneous noncompetitive oil and gas lease applicant uses as its mailing address a post office box rented and exclusively controlled by officers of a lease filing service, the applicant is merely using an alternate address for the service, in violation of 43 CFR 3112.2-1(b), which bars the use on the application of the address of any entity which is in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

SATELLITE 8309119, 99 IBLA 301 (Oct. 27, 1987)

SATELLITE 8307138, SATELLITE 8309175, 99 IBLA 307 (Oct. 27, 1987)

Description

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. A noncompetitive over-the-counter lease offer for acquired lands which correctly describes the lands as described in the Declaration of Taking, but includes a description of the land by course and distance which is incorrect, is properly rejected since the incorrect description renders the face of the offer

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Description--Continued

subject to corrections absent which the lease could not issue.

Henry P. Ellsworth, 97 IBLA 74 (Apr. 28, 1987)

Drawings

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer to the extent that it covers acquired military lands formerly included in an oil and gas lease which was relinquished. Lands formerly embraced within oil and gas leases that have been relinquished, to the extent they are subject to noncompetitive leasing, must be leased pursuant to the simultaneous filing procedures at 43 CFR Subpart 3112.

Robert D. Bluntzer, 95 IBLA 247 (Jan. 23, 1987)

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a partnership if the applicant has not complied with the provisions of 43 CFR 3112.2-3 by disclosing the identity of all partners on the application or on a sheet accompanying the application, a substantive requirement of the oil and gas leasing program.

R. G. B. Co., 95 IBLA 300 (Jan. 29, 1987)

Where it is clear from the record that the person signing a simultaneous oil and gas lease offer on behalf of a corporation is a duly authorized corporate officer, compliance is established with the requirements of the regulation at 43 CFR 3102.4 notwithstanding the fact the signing officer was identified as an attorney-in-fact.

Lear Petroleum Exploration, Inc., 95 IBLA 304 (Jan. 30, 1987)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

A simultaneous oil and gas lease applicant is not entitled to a refund of his filing fee unless it is established that BLM knew or should have known that the land was situated within a known geologic structure of a producing oil or gas field at the time it posted the land as available for simultaneous leasing.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

BLM may properly declare simultaneous oil and gas lease applications unacceptable and return the filing fees and first year's rentals, minus a $75 processing fee for each Part B application form, where the applicant failed to submit separate remittances in payment of the filing fees and first year's rentals with each Part B application, notwithstanding written advice from BLM that a single remittance would be acceptable.

Thomas S. Arnold, 97 IBLA 271 (May 14, 1987)

Where a simultaneous noncompetitive oil and gas lease applicant uses as its mailing address a post office box rented and exclusively controlled by officers of a lease filing service, the applicant is merely using an alternate address for the service, in violation of 43 CFR 3112.2-1(b), which bars the use on the application of the address of any entity which is in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

SATELLITE 8309119, 99 IBLA 301 (Oct. 27, 1987)

SATELLITE 8307138, SATELLITE 8309175, 99 IBLA 307 (Oct. 27, 1987)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

Pursuant to the Notice published in the Federal Register on Aug. 19, 1983, 48 FR 37656, issued under the authority of 43 CFR 3102.5, a limited partnership is required to submit with a simultaneously filed application for an oil and gas lease the names of all of its general partners, and all other partners holding or controlling more than 10 percent of the partnership. It is not required to submit a list of limited partners where such partners own 10 percent or less of the partnership.

TXP Operating Co., 99 IBLA 355 (Nov. 3, 1987)

If, on the face of Part B of a simultaneous oil and gas lease application, an applicant indicates the selection of a parcel by shading a tract number "bubble" for a tract which was not listed by parcel number as a parcel available for selection on the closing date for filing applications, such mark is surplus, and the application should not be deemed unacceptable for failure to submit the first year's rental and/or filing fee for that tract.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

A notice published in the Federal Register, wherein BLM interprets and clarifies existing regulations to ensure compliance with regulatory provisions at 43 CFR 3102.5, is a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a partnership if the applicant has not complied with 43 CFR 3112.2-3, by disclosing the identity of all partners on the application or on a sheet accompanying the application, a substantive requirement of the oil and gas leasing program.

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreements within 30 days of receipt of notice to do so, the application is properly rejected.

David A. Gitlitz, 95 IBLA 221 (Jan. 15, 1987)

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and priority among them is determined by drawing in accordance with 43 CFR 1821.2-3.

Roberts & Koch, 95 IBLA 239 (Jan. 16, 1987)

A simultaneous oil and gas lease application is properly rejected when the executed lease forms are not received by the proper BLM office within 30 days from the date applicant receives the lease forms sent for execution.

Marion Bernice Phillips, 95 IBLA 297 (Jan. 29, 1987)

An oil and gas lease application filed on an obsolete (1981) form formerly employed in the simultaneous oil and gas leasing program is properly accepted by BLM where the form is processed in the automated system without difficulty, where the applicant has marked and enclosed the proper remittance, and where the applicant has provided all information necessary to police the system to prevent fraud or abuse.

Albert L. Lang, Jr., 95 IBLA 357 (Feb. 11, 1987)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

The failure to date the signature on an over-the-counter oil and gas lease offer is not a per se disqualification of the offeror and a decision rejecting an offer on this basis is properly reversed.

Henry W. Odlozil, Sr., 96 IBLA 286 (Mar. 30, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 3111.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Filing--Continued

Departmental regulation 43 CFR 3111.1-1(a), requires that an over-the-counter noncompetitive oil and gas lease offer be made on a current form approved by the Director, or on unofficial copies of that form in current use. Copies must be exact reproductions on one page of both sides of the official-approved form and must be manually signed in ink and dated by the offeror or the offeror's duly authorized agent or attorney in fact. An original and two signed copies of each offer to lease must be filed in the proper BLM office. An oil and gas lease offer which is not properly filed in accordance with these requirements must be rejected pursuant to 43 CFR 3111.1-1(f).

Where an applicant submits evidence which supports a conclusion that two copies of his noncompetitive lease offer were timely filed as required by the regulations in 43 CFR 3111.1-1(a), a decision rejecting that offer for failure to comply with the applicable regulation by filing only one copy of the lease offer will be set aside.

New Mexico & Arizona Land Co., 99 IBLA 190 (Oct. 13, 1987)

If, on the face of Part B of a simultaneous oil and gas lease application, an applicant indicates the selection of a parcel by shading a tract number "bubble" for a tract which was not listed by parcel number as a parcel available for selection on the closing date for filing applications, such mark is surplus, and the application should not be deemed unacceptable for failure to submit the first year's rental and/or filing fee for that tract.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

Simultaneous

BLM is required to reject a simultaneous noncompetitive oil and gas lease application drawn with priority if the land is found to be within a known geologic structure of a producing oil or gas field, even if the determination is made after the drawing and during a lengthy delay in the processing of the

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Simultaneous--Continued

application occasioned by Departmental review of noncompetitive leasing in the Wyoming overthrust belt area.

A simultaneous oil and gas lease applicant is not entitled to a refund of his filing fee unless it is established that BLM knew or should have known that the land was situated within a known geologic structure of a producing oil or gas field at the time it posted the land as available for simultaneous leasing.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

Where a simultaneous noncompetitive oil and gas lease applicant uses as its mailing address a post office box rented and exclusively controlled by officers of a lease filing service, the applicant is merely using an alternate address for the service, in violation of 43 CFR 3112.2-1(b), which bars the use on the application of the address of any entity which is in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

SATELLITE 8309119, 99 IBLA 301 (Oct. 27, 1987)

SATELLITE 8307138, SATELLITE 8309175, 99 IBLA 307 (Oct. 27, 1987)

640-acre Limitation

An oil and gas lease offer for less than 640 acres or one full section, whichever is larger, is properly rejected, unless the offer includes all available lands within a section and there are no contiguous lands available for lease.

New Mexico & Arizona Land Co., 96 IBLA 178 (Mar. 18, 1987)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

2,560-acre Limitation

An oil and gas lease offer for lands in Alaska describing the lands sought as less than 2,560 acres or four full sections, whichever is larger, is properly rejected, unless the offer includes all available lands within the subject sections and there are no contiguous lands available for lease.

Isabelle C. Chang, 99 IBLA 282 (Oct. 22, 1987)

ASSIGNMENTS OR TRANSFERS

BLM should properly suspend action on a request for approval of an assignment if it receives notice of a dispute between the parties as to the validity of the assignment.

J. R. Holcomb Oil, 96 IBLA 35 (Feb. 27, 1987)

When conflicting oil and gas lease assignments are filed with BLM, suggesting a controversy as to the validity of either or both of those assignments, the denial or approval of either of those assignments is improper; rather, BLM should suspend action on the assignments, maintaining the status quo until presented with either evidence that the parties have resolved the dispute or a copy of a court decree concerning the matter in controversy. However, if BLM has mistakenly approved one of the assignments and subsequently denied approval of the other assignment, the approval will not be rescinded, but the denial will be set aside for a period of time sufficient to allow the parties to institute litigation or take other action to resolve the dispute. Failure to take appropriate action within the time allowed will result in confirmation of the approved assignment.

Herbert P. Kenney, Jr., 96 IBLA 84 (Mar. 2, 1987)

Robert Walli, 99 IBLA 128 (Sept. 22, 1987)

ASSIGNMENTS OR TRANSFERS--Continued

A decision disallowing a pending partial assignment of an oil and gas lease will be affirmed where, prior to approval of the partial assignment, the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental for the lands described in the partial assignment prior to the anniversary date.

While a potential assignee of an oil and gas lease may pay the annual rental, BLM is under no obligation to give the potential assignee a courtesy notice of rental due prior to the lease anniversary date.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

Pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), oil and gas leases may be issued to citizens, associations of citizens, or to a corporation organized under the laws of the United States or any State thereof. The filing of a proposed assignment in conformity with the applicable laws and regulations ordinarily requires approval by the Department except for lack of qualifications of the assignee or lack of a sufficient bond. A decision rejecting an assignment to a Delaware corporation on the ground it is not registered under State law to do business in the State where the oil and gas leases are located will be vacated where no such requirement is found in the statute or regulations governing qualifications to hold oil and gas leases, although such a factor may be relevant to setting bond coverage requirements.

Pardee Petroleum Corp., 98 IBLA 20 (May 29, 1987)

An oil and gas lease created by a partial assignment during the primary term of the original lease is entitled to a 2-year continuation dating from discovery of oil or gas in paying quantities on any other segregated portion of the original lease, regardless of whether the discovery occurred prior to or after the effective date of the assignment.

JSC Producers, 99 IBLA 164 (Oct. 2, 1987)

OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

Where a lease achieves a discovery of oil or gas in paying quantities during the third year of its primary term and a partial assignment of this lease occurs during its tenth year, 30 U.S.C. § 187a (1982), does not provide a basis for extending the undeveloped assigned lease segregated by such assignment.

Fuel Resources Development Co., 100 IBLA 37 (Nov. 19, 1987)

BONA FIDE PURCHASER

The provision of 30 U.S.C. § 184(h)(2) (1982) protecting the interests of bona fide purchasers from certain action by the Department to cancel an oil and gas lease is not applicable to expiration of a lease by operation of law under 30 U.S.C. § 226 (1982).

Landmark Exploration Co., 97 IBLA 96 (Apr. 29, 1987)

BONDS

The period of liability of an oil and gas lease bond may not be terminated until all the terms and conditions of the lease have been satisfied, including the payment of all necessary compensatory royalty.

R. K. Teichgraeber, 96 IBLA 249 (Mar. 25, 1987)

BLM has authority under 43 CFR 3104.5 to increase the required amount of bond coverage for Federal oil and gas leases whenever circumstances justify a conclusion by BLM that the previously set bond coverage is insufficient to ensure fullfillment of all lease obligations. A BLM decision requiring an increase in the amount of bond coverage for ongoing lease operations will be upheld where the party required to post the increased amount disputes the increase but fails to establish error in BLM's determination thereof.

Pardee Petroleum Corp., 98 IBLA 20 (May 29, 1987)

OIL AND GAS LEASES--Continued

CANCELLATION

BLM must cancel a noncompetitive oil and gas lease of acquired lands where the lessee failed to fully pay the first year's advance rental at the time of submission of his lease offer, in accordance with 43 CFR 3103.3-1 (1979), the deficiency was more than 10 percent and a subsequent lease offer was filed by a qualified third party.

Sun Exploration & Production Co., 95 IBLA 140 (Jan. 12, 1987)

A decision cancelling a competitive oil and gas lease issued to the high bidder established by tie-breaking bid at a competitive lease sale will be reversed where BLM followed its established procedure for requesting additional bids and there is no evidence of fraud or collusion in the bidding process. An apparent defect in service of notice on one of the tie bidders discovered after lease issuance will not justify cancellation where no timely appeal has been taken from refund of the bid deposit and it does not appear from the facts that the ability of the Government to obtain the highest qualified bid has been prejudiced.

Fortune Oil Co., 97 IBLA 85 (Apr. 28, 1987)

Where it is shown that an oil and gas lease which improperly issued embraces lands presently known to contain valuable deposits of oil or gas, the Department may not, consistent with 43 CFR 3108.3(c), administratively cancel such lease, but must commence suit in Federal district court to obtain a judicial cancellation of the lease.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

It is improper to cancel an oil and gas lease where BLM had previously approved the assigrment of the lease, the assignees were bona fide purchasers, and it has not been shown that the lease was issued in violation of any statutory or regulatory provision.

Champlin Petroleum Co., 99 IBLA 278 (Oct. 21, 1987)

OIL AND GAS LEASES--Continued

CANCELLATION--Continued

Where a simultaneous noncompetitive oil and gas lease applicant violates 43 CFR 3112.2-1(b) by using a post office box rented and exclusively controlled by officers of a lease filing service, it has failed to submit an application that would qualify it to receive an oil an gas lease, and administrative cancellation of a lease issued pursuant to the application is required.

SATELLITE 8309119, 99 IBLA 301 (Oct. 27, 1987)

SATELLITE 8307138, SATELLITE 8309175, 99 IBLA 307 (Oct. 27, 1987)

CIVIL ASSESSMENTS AND PENALTIES

Where 43 CFR 3163.3(a) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Exxon Corp., 95 IBLA 165 (Jan. 13, 1987)

The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal valves as required by 43 CFR 3162.7-4(b)(1).

An assessment for failure to seal appropriate valves levied pursuant to 43 CFR 3163.3(j) may be vacated by the Board in view of the suspension of that regulation by the Bureau of Land Management and the change in Department policy regarding automatic assessments.

Hardy Salt Co., 96 IBLA 39 (Feb. 27, 1987)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to have all meters functioning properly, and assess liquidated damages under 43 CFR 3163.3(a) for failure to timely comply with that notice by calibrating the meters. The $250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to shorten meter hoses in order to prevent the collection of fluid in low spots, and assess liquidated damages under 43 CFR 3163.3(a) for failure to comply with that notice. The $250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

William Perlman, 96 IBLA 181 (Mar. 18, 1987)

A BLM decision imposing civil penalties pursuant to the Federal Oil and Gas Royalty Management Act for continued noncompliance with an order to eliminate low spots in meter hoses will be affirmed on appeal where the record shows the lessee failed to comply with the order, and the order was designed to ensure the accuracy of the meter readings in accordance with the terms of the lessee's application for permit to drill.

William Perlman, 96 IBLA 327 (Apr. 7, 1987)

BLM may properly render an assessment of $250 under 43 CFR 3163.3(a) against a unit operator who fails to comply with a written order to submit site-facility diagrams for all facilities located on lands subject to a unit agreement approved by the Department's authorized officer, whether those facilities are located on private, Federal, or Indian leases. The $250 assessment for noncompliance with BLM's written order is a one-time charge per violation under 43 CFR 3163.3.

Tricentrol United States, Inc., 97 IBLA 387 (May 27, 1987)

OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

A BLM decision to assess liquidated damages and civil penalties for failure to comply with a written order of an authorized BLM officer will be reversed where the record does not establish that the lessee was served with the order prior to the assessment of liquidated damages pursuant to 43 CFR 3163.3(a) and prior to the assessment of civil penalties pursuant to 43 CFR 3163.4-1.

Robert C. Anderson Oil Properties, 98 IBLA 82 (June 10, 1987)

The BLM may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7(b)(1).

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board in view of the suspension of that regulation.

The determination that an assessment for non-compliance with 43 CFR 3103.3(a) should be levied is discretionary, and the levy of an assessment is not automatic. The Board will set aside a BLM technical and procedural review decision that levy of an assessment is automatic and remand the case to allow BLM's exercise of discretion.

Mingo Oil Producers (On Reconsideration), 98 IBLA 133 (June 22, 1987)

On appeal from an assessment for failure to timely abate an incident of noncompliance (INC), the assessment will be affirmed where the INC is found to be proper and it is undisputed the operator did not achieve compliance within the time allowed. An inquiry of the Bureau of Land Management regarding the propriety of the INC will not ordinarily justify a failure to timely abate in the absence of a timely request for administrative review of the INC coupled with a request for suspension or a request for extension of time to comply.

Timberline Production Co., 98 IBLA 188 (June 26, 1987)

OIL AND GAS LEASES--Continued

COMMUNITIZATION AGREEMENTS

Where unit termination coincides with the conclusion of the primary term of a producing lease committed to said unit, the lease is extended by 30 U.S.C. § 226(j) (1982), for a fixed term of 2 years and is not regarded as held by production during this 2-year period.

Pennzoil Co., 99 IBLA 245 (Oct. 20, 1987)

BLM may properly require the operator of a communitized area to conduct a 60-day test of a well pursuant to 43 CFR 3162.4-2(b), where the communitization agreement and the leases thereunder are each held in an extended term and the well at issue has been shut in for 2 years.

Byron Oil Industries, Inc., 100 IBLA 84 (Nov. 30, 1987)

COMPENSATORY ROYALTY

The period of liability of an oil and gas lease bond may not be terminated until all the terms and conditions of the lease have been satisfied, including the payment of all necessary compensatory royalty.

R. K. Teichgraeber, 96 IBLA 249 (Mar. 25, 1987)

COMPETITIVE LEASES

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Once BLM establishes the prima facie correctness of its presale evaluation, a party appealing from rejection of its high bid must not only show error in the Government's evaluation, it must also affirmatively establish that its bid represents fair market value.

Harris-Headrick, 95 IBLA 124 (Jan. 6, 1987)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome, by a preponderance of the evidence, BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and fails to establish that its bid reasonably reflects fair market value.

MTS Limited Partnership, 95 IBLA 337 (Jan. 30, 1987)

Michael Shearn, 96 IBLA 13 (Feb. 26, 1987)

Suzanne Walsh, 98 IBLA 213 (July 1, 1987)

The Board will affirm BLM's dismissal of a protest of an oil and gas lease sale where the protestant's allegations that the winning bidder enjoyed an unfair advantage and that BLM was remiss in its duties in conducting the sale are unsupported by the record.

Chevron U.S.A. Inc., 96 IBLA 272 (Mar. 26, 1987)

If a reasonable and factual basis for a decision rejecting a high bid appears in the record, a prima facie case justifying the rejection is established and the burden shifts to the appellant to both affirmatively show error in BLM's decision and also establish that its own bid represents the fair market value of the parcel. When an appellant fails to provide sufficient evidence and analysis to show error in the decision to overcome BLM's prima facie case, the rejection of the high bid will be affirmed.

If an appellant successfully challenges the basis for BLM'S decision rejecting his high bid, the issue becomes whether his bid represents the fair market value of the lease because absent such a showing the Board cannot order issuance of the lease. If the evidence presented fails to show that the high bid was inadequate, the decision will be set aside and the case remanded to BLM for consideration of the evidence or, if appropriate, a hearing will be ordered. If the evidence is clearly insufficient to establish the adequacy of the bid, BLM's decision will be affirmed.

Suzanne Walsh, 96 IBLA 374 (Apr. 14, 1987)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

A decision cancelling a competitive oil and gas lease issued to the high bidder established by tie-breaking bid at a competitive lease sale will be reversed where BLM followed its established procedure for requesting additional bids and there is no evidence of fraud or collusion in the bidding process. An apparent defect in service of notice on one of the tie bidders discovered after lease issuance will not justify cancellation where no timely appeal has been taken from refund of the bid deposit and it does not appear from the facts that the ability of the Government to obtain the highest qualified bid has been prejudiced.

Fortune Oil Co., 97 IBLA 85 (Apr. 28, 1987)

Where, in the adjudication of an appeal from a decision of BLM rejecting a high bid for a competitive oil and gas lease as inadequate, BLM establishes a rational basis for its determination, the burden of proof shifts to appellant to establish that the bid submitted represents fair market value.

Where the record establishes that a number of bids submitted for various parcels of land in a competitive oil and gas lease sale were below BLM's presale estimate of value and that some were accepted while others were not, and no justification for this seemingly disparate treatment has been provided, the Board will set aside a decision rejecting a high bid and remand the case to BLM so that an explanation of the procedures utilized may be provided.

Southern Union Exploration Co., 97 IBLA 275 (May 15, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale when the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. When an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value, a decision by BLM to reject a bid will be sustained.

Southern Union Exploration Co., 97 IBLA 322 (May 20, 1987)

Mathew Wolf, 98 IBLA 193 (June 29, 1987)

While the Secretary of the Interior has the discretionary authority to reject any or all bids as inadequate, once a decision has been made to accept a bid and this decision has been formally communicated by the authorized officer to the bidder, such discretionary authority has been exercised and the bid may not subsequently be rejected for an alleged inadequacy of the bonus bid.

Where a Notice of Sale of competitive leases expressly notes that a particular parcel will be subject to special stipulations designed to protect big game winter range habitat and the precise nature of the restrictions would be made clear upon inquiry to the State Office as provided by 43 CFR 3120.4-1, an offeror will be deemed to have agreed to accept such stipulation even though it was not specifically described in the Notice of Sale.

Exxon Corp., 97 IBLA 330 (May 21, 1987)

Where, in the adjudication of an appeal from a decision of BLM rejecting a high bid for a competitive oil and gas lease as inadequate, BLM establishes a rational basis for its determination, the burden of proof shifts to an appellant to establish that the bid submitted represents fair market value.

Viking Resources Corp., 97 IBLA 363 (May 26, 1987)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. In such cases, a decision rejecting a bid should set forth the basis for rejection with sufficient detail to inform the bidder of the factual basis of the decision and allow the Board to make an informed determination of the correctness of the decision if the decision is disputed on appeal.

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases if he has reason to believe the bid price is less than the fair market value. If BLM supports the rejection with sufficient evidence to demonstrate a rational basis for its decision, an appellant must show BLM has erred when formulating the fair market value. If an appellant demonstrates an error in BLM's calculation of the fair market value, the net effect is to create question as to the underlying fair market value determination. This being the case, an appellant also has an affirmative obligation to establish that the bid it submitted is a reasonable reflection of the fair market value. If an appellant fails to establish this fact, this Board will uphold the Secretary's discretionary authority and affirm the rejection decision.

Burton/Hawks, Inc., 98 IBLA 118 (June 17, 1987)

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases if he has reason to believe the bid price is less than the fair market value. If BLM supports the rejection with sufficient evidence to demonstrate a rational basis for its decision, an appellant must show BLM has erred when formulating the fair market value. An appellant also has an affirmative obligation to establish that the bid it submitted is a reasonable reflection of the fair market value.

Read & Stevens, Inc., 98 IBLA 268 (July 10, 1987)

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

A single personal check covering four competitive oil and gas lease bid deposits is not an acceptable form of remittance under 43 CFR 3120.4-1, which requires remittances to be submitted in the form specified in the competitive sale notice, when that notice requires bidders to submit separate bids with a bid deposit by guaranteed remittance, i.e., cash, cashier's check, or postal money order.

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases where the bid is less than the Government's fair market valuation. Where BLM fails to provide a rational basis for its rejection decision or where the bidder shows that the BLM evaluation is in error, the bidder also has an affirmative obligation to show that the bid it submitted reasonably reflects fair market value in order to be awarded the lease.

George H. Fentress, 99 IBLA 184 (Oct. 13, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the rejection. Where a bid is below the administrative minimum set in the sale notice, there is a rational basis for rejection of the bid.

GeoResources, Inc., 99 IBLA 369 (Nov. 4, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The bidder must be provided with an explanation of the factual basis of the decision sufficient for the Board to determine the correctness of the decision if disputed on appeal.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show that there is the lack of a rational basis for the decision or that BLM erred when formulating its fair market valuation, but must also establish that its

OIL AND GAS LEASES--Continued

COMPETITIVE LEASES--Continued

bid represents fair market value in order to be awarded the lease.

Miller Brothers Oil Corp., 100 IBLA 172 (Dec. 8, 1987)

CONSOLIDATION

A decision denying a request for consolidation of oil and gas leases will be affirmed on appeal where the applicants have failed to show that consolidation would be in the interests of conservation.

Marathon Oil Co., Celeste Grynberg, 97 IBLA 102 (Apr. 29, 1987)

DESCRIPTION OF LAND

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. A noncompetitive over-the-counter lease offer for acquired lands which correctly describes the lands as described in the Declaration of Taking, but includes a description of the land by course and distance which is incorrect, is properly rejected since the incorrect description renders the face of the offer subject to corrections absent which the lease could not issue.

Henry P. Ellsworth, 97 IBLA 74 (Apr. 28, 1987)

OIL AND GAS LEASES--Continued

DESCRIPTION OF LAND--Continued

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 3111.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

DISCRETION TO LEASE

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Once BLM establishes the prima facie correctness of its presale evaluation, a party appealing from rejection of its high bid must not only show error in the Government's evaluation, it must also affirmatively establish that its bid represents fair market value.

Harris-Headrick, 95 IBLA 124 (Jan. 6, 1987)

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome, by a preponderance of the evidence, BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and fails to establish that its bid reasonably reflects fair market value.

MTS Limited Partnership, 95 IBLA 337 (Jan. 30, 1987)

Michael Shearn, 96 IBLA 13 (Feb. 26, 1987)

Suzanne Walsh, 98 IBLA 213 (July 1, 1987)

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Continued

Where, in the adjudication of an appeal from a decision of BLM rejecting a high bid for a competitive oil and gas lease as inadequate, BLM establishes a rational basis for its determination, the burden of proof shifts to appellant to establish that the bid submitted represents fair market value.

Where the record establishes that a number of bids submitted for various parcels of land in a competitive oil and gas lease sale were below BLM's presale estimate of value and that some were accepted while others were not, and no justification for this seemingly disparate treatment has been provided, the Board will set aside a decision rejecting a high bid and remand the case to BLM so that an explanation of the procedures utilized may be provided.

Southern Union Exploration Co., 97 IBLA 275 (May 15, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale when the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. When an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value, a decision by BLM to reject a bid will be sustained.

Southern Union Exploration Co., 97 IBLA 322 (May 20, 1987)

Mathew Wolf, 98 IBLA 193 (June 29, 1987)

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Continued

While the Secretary of the Interior has the discretionary authority to reject any or all bids as inadequate, once a decision has been made to accept a bid and this decision has been formally communicated by the authorized officer to the bidder, such discretionary authority has been exercised and the bid may not subsequently be rejected for an alleged inadequacy of the bonus bid.

Exxon Corp., 97 IBLA 330 (May 21, 1987)

Where, in the adjudication of an appeal from a decision of BLM rejecting a high bid for a competitive oil and gas lease as inadequate, BLM establishes a rational basis for its determination, the burden of proof shifts to an appellant to establish that the bid submitted represents fair market value.

Viking Resources Corp., 97 IBLA 363 (May 26, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. In such cases, a decision rejecting a bid should set forth the basis for rejection with sufficient detail to inform the bidder of the factual basis of the decision and allow the Board to make an informed determination of the correctness of the decision if the decision is disputed on appeal.

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases if he has reason to believe the bid price is less than the fair market value. If BLM supports the rejection with sufficient evidence to demonstrate a rational basis for its decision, an appellant must show BLM has erred when formulating the fair market value. If an appellant demonstrates an error in BLM's calculation of the fair market value, the net effect is to create question as to the underlying fair market value determination. This being the case, an appellant also has an affirmative obligation to establish that the bid it submitted is a reasonable reflection of the fair market value. If an appellant fails to establish this fact, this Board will uphold

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Continued

the Secretary's discretionary authority and affirm the rejection decision.

Burton/Hawks, Inc., 98 IBLA 118 (June 17, 1987)

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases if he has reason to believe the bid price is less than the fair market value. If BLM supports the rejection with sufficient evidence to demonstrate a rational basis for its decision, an appellant must show BLM has erred when formulating the fair market value. An appellant also has an affirmative obligation to establish that the bid it submitted is a reasonable reflection of the fair market value.

Read & Stevens, Inc., 98 IBLA 268 (July 10, 1987)

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases where the bid is less than the Government's fair market valuation. Where BLM fails to provide a rational basis for its rejection decision or where the bidder shows that the BLM evaluation is in error, the bidder also has an affirmative obligation to show that the bid it submitted reasonably reflects fair market value in order to be awarded the lease.

George H. Fentress, 99 IBLA 184 (Oct. 13, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the rejection. Where a bid is below the administrative minimum set in the sale notice, there is a rational basis for rejection of the bid.

GeoResources, Inc., 99 IBLA 369 (Nov. 4, 1987)

OIL AND GAS LEASES--Continued

DISCRETION TO LEASE--Continued

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The bidder must be provided with an explanation of the factual basis of the decision sufficient for the Board to determine the correctness of the decision if disputed on appeal.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show that there is the lack of a rational basis for the decision or that BLM erred when formulating its fair market valuation, but must also establish that its bid represents fair market value in order to be awarded the lease.

Miller Brothers Oil Corp., 100 IBLA 172 (Dec. 8, 1987)

DRILLING

Extension of an oil and gas lease by reason of drilling over the expiration date of the lease requires that drilling operations be ongoing on the expiration date and be conducted in the manner in which someone seriously looking for oil or gas in that area could be expected to proceed. A decision holding a lease to have expired will be affirmed where the well on the lease was abandoned prior to the lease expiration date, notwithstanding the lessee's intent to drill an additional well.

Mobil Producing Texas & New Mexico, Inc., 99 IBLA 5 (Aug. 11, 1987)

Pursuant to 43 CFR 3165.4 (1986), decisions of BLM officials implementing the onshore oil and gas operating regulations at 43 CFR Subpart 3160 are an exception to the general rule set forth at 43 CFR 4.21(a), and are not automatically stayed pending appeal. Once an appeal to the Board has been filed,

OIL AND GAS LEASES--Continued

DRILLING--Continued

requests for suspension are properly filed with the Board of Land Appeals.

Southern Utah Wilderness Alliance, 100 IBLA 63 (Nov. 30, 1987)

EXPIRATION

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

An oil and gas lease created by a partial assignment during the primary term of the original lease is entitled to a 2-year continuation dating from discovery of oil or gas in paying quantities on any other segregated portion of the original lease, regardless of whether the discovery occurred prior to or after the effective date of the assignment.

JSC Producers, 99 IBLA 164 (Oct. 2, 1987)

EXTENSIONS

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal,

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

Where a lease committed in part to a unit agreement is extended by reason of production at the time of commitment, the segregated nonunitized lease is extended for the life of such production but not less than 2 years from the date of segregation pursuant to sec. 17(j) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(j) (1982).

Anadarko Production Co., 96 IBLA 320 (Apr. 7, 1987) 94 I.D. 129

Where an oil and gas lease in its primary term is partially committed to a unit agreement, the term of the nonunitized lease created by segregation is the remainder of the primary term of the parent lease but not less than 2 years from the date of segregation.

Raymond T. Duncan et al., 96 IBLA 352 (Apr. 8, 1987)

Rejection of an application for a right-of-way for road access across Federal lands not under lease to a drill site on a Federal oil and gas lease may be reasonable where it is filed too close to the expiration date of the lease (after which the right-of-way would be meaningless) to allow processing consistent with the Department's statutory obligations under the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976. However, where an application for suspension of operations is filed prior to lease expiration to obtain time for approval of the right-of-way, rejection of the

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

right-of-way application will be set aside as premature in the absence of an adjudication of the request for suspension.

The Secretary of the Interior is authorized to suspend oil and gas leases in the interest of conservation where action cannot be taken on an application because of the time needed to comply with requirements of the National Environmental Policy Act of 1969. Where the lessee's inability to commence drilling prior to lease expiration cannot be attributed to any order, delay, or inaction by any Federal agency, the Secretary is not obligated to grant a suspension but has the discretion to do so in the exercise of his informed discretion upon a finding that it is in the interest of conservation.

John March, 98 IBLA 143 (June 22, 1987)

Extension of an oil and gas lease by reason of drilling over the expiration date of the lease requires that drilling operations be ongoing on the expiration date and be conducted in the manner in which someone seriously looking for oil or gas in that area could be expected to proceed. A decision holding a lease to have expired will be affirmed where the well on the lease was abandoned prior to the lease expiration date, notwithstanding the lessee's intent to drill an additional well.

The Secretary of the Interior has the discretionary authority to suspend an oil and gas lease in the interest of conservation where drilling under prevailing conditions would damage the lease environment. Although a suspension of operations may be granted retroactively after the lease expiration date, a prerequisite is an application filed prior to the expiration of the lease. In the absence of a timely filed application, there is no lease in existence which may be suspended.

Mobil Producing Texas & New Mexico, Inc., 99 IBLA 5 (Aug. 11, 1987)

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

Under 30 U.S.C. § 226(j) (1982), any lease partially committed to a unit plan shall be segregated into separate leases as to the lands committed and the lands not committed. Thereafter, they are distinct leases, and are administered independently of each other. The statute does not give the segregated non-unitized portion of a lease a new term, but provides that the lease shall continue in force and effect for the term thereof, but for not less than 2 years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities. The word "term" here refers to the entire term of the lease, i.e., the period the lease has to run, whether that period were definite or indefinite, as it existed on the date of segregation.

Under 30 U.S.C. § 226(j) (1982), any lease which shall be eliminated from any approved unit plan and any lease which shall be in effect at the termination of such a plan shall continue in effect for the original term thereof, but for not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities. This provision is mandatory and leaves no room for the exercise of discretion. It applies to any lease eliminated from a unit plan without exception.

If a lease is no longer in its original term, but is held by production at the time of its elimination from a unit, it continues under 30 U.S.C. § 226(j) (1982), for a fixed term of 2 years and so long thereafter as oil or gas is produced in paying quantities.

Celsius Energy Co., Southland Royalty Co., 99 IBLA 53 (Sept. 8, 1987) 94 I.D. 394

An oil and gas lease created by a partial assignment during the primary term of the original lease is entitled to a 2-year continuation dating from discovery of oil or gas in paying quantities on any other segregated portion of the original lease, regardless of whether the discovery occurred prior to or after the effective date of the assignment.

JSC Producers, 99 IBLA 164 (Oct. 2, 1987)

OIL AND GAS LEASES--Continued

EXTENSIONS--Continued

Where unit termination coincides with the conclusion of the primary term of a producing lease committed to said unit, the lease is extended by 30 U.S.C. § 226(j) (1982), for a fixed term of 2 years and is not regarded as held by production during this 2-year period.

Pennzoil Co., 99 IBLA 245 (Oct. 20, 1987)

Where a lease achieves a discovery of oil or gas in paying quantities during the third year of its primary term and a partial assignment of this lease occurs during its tenth year, 30 U.S.C. § 187a (1982), does not provide a basis for extending the undeveloped assigned lease segregated by such assignment.

Fuel Resources Development Co., 100 IBLA 37 (Nov. 19, 1987)

FIRST-QUALIFIED APPLICANT

The failure to date the signature on an over-the-counter oil and gas lease offer is not a per se disqualification of the offeror and a decision rejecting an offer on this basis is properly reversed.

Henry W. Odlozil, Sr., 96 IBLA 286 (Mar. 30, 1987)

FUTURE AND FRACTIONAL INTEREST LEASES

In those cases where the mineral interest in the land will vest in the United States at some future date, a future interest oil and gas lease offer may be filed by a party qualified to file such an offer. When a noncompetitive oil and gas lease offer filed subsequent to vesting is rejected because an oil and gas lease had been issued to an offeror who had filed an offer prior to the date the minerals had vested in the United States, it must be shown that the offeror who was prior in time was qualified to file a future interest oil and gas lease offer. If the record does not contain evidence the prior offeror was so qualified, the decision rejecting the second offer will be set aside and the casefile remanded to BLM for a determination regarding the proper qualification of the

OIL AND GAS LEASES--Continued

FUTURE AND FRACTIONAL INTEREST LEASES--Continued

first offeror, and, if necessary, cancellation of the lease issued to the first offeror.

F. F. Schell et al., 100 IBLA 296 (Dec. 22, 1987)

INCIDENTS OF NONCOMPLIANCE

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to shorten meter hoses in order to prevent the collection of fluid in low spots, and assess liquidated damages under 43 CFR 3163.3(a) for failure to comply with that notice. The $250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly require an oil and gas lessee to construct a berm around a tank in which produced water is stored, because BLM is authorized by Departmental regulations to issue instructions or orders relating to the protection of environmental quality. However, such a requirement may not be based upon a condition in the lessee's application for permit to drill requiring the construction of firewalls around tank batteries since a firewall is a wall to retain oil in case of its escape from a tank or to prevent the spread of burning oil.

William Perlman, 96 IBLA 181 (Mar. 18, 1987)

BLM may properly render an assessment of $250 under 43 CFR 3163.3(a) against a unit operator who fails to comply with a written order to submit site-facility diagrams for all facilities located on lands subject to a unit agreement approved by the Department's authorized officer, whether those facilities are located on private, Federal, or Indian leases. The $250 assessment for noncompliance with BLM's written order is a one-time charge per violation under 43 CFR 3163.3.

Tricentrol United States, Inc., 97 IBLA 387 (May 27, 1987)

OIL AND GAS LEASES--Continued

INCIDENTS OF NONCOMPLIANCE--Continued

A BLM decision to assess liquidated damages and civil penalties for failure to comply with a written order of an authorized BLM officer will be reversed where the record does not establish that the lessee was served with the order prior to the assessment of liquidated damages pursuant to 43 CFR 3163.3(a) and prior to the assessment of civil penalties pursuant to 43 CFR 3163.4-1.

Robert C. Anderson Oil Properties, 98 IBLA 82 (June 10, 1987)

On appeal from an assessment for failure to timely abate an incident of noncompliance (INC), the assessment will be affirmed where the INC is found to be proper and it is undisputed the operator did not achieve compliance within the time allowed. An inquiry of the Bureau of Land Management regarding the propriety of the INC will not ordinarily justify a failure to timely abate in the absence of a timely request for administrative review of the INC coupled with a request for suspension or a request for extension of time to comply.

Timberline Production Co., 98 IBLA 188 (June 26, 1987)

KNOWN GEOLOGIC STRUCTURE

BLM is required to reject a simultaneous non-competitive oil and gas lease application drawn with priority if the land is found to be within a known geologic structure of a producing oil or gas field, even if the determination is made after the drawing and during a lengthy delay in the processing of the application occasioned by Departmental review of non-competitive leasing in the Wyoming overthrust belt area.

A simultaneous oil and gas lease applicant will not be deemed to have overcome a determination by BLM that land described in the application is within a known geologic structure of a producing oil or gas field by a preponderance of the evidence if the appellant does not challenge BLM's placement of the estimated structural limits of the productive formation or if the evidence submitted merely demonstrates that there is a divergence of expert opinion regarding

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

whether that formation extends under the land at a producible depth.

When defining the exterior boundary of a known geologic structure of a producing oil or gas field BLM may not include the entire section any part of which is crossed by the stratigraphic contour used in the determination of the extent of the geologic structure.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

The Board will sustain a determination by BLM that land in a noncompetitive oil and gas lease is situated within the known geologic structure of a producing oil or gas field where the lessee has not established by a preponderance of the evidence that the land is downdip of the gas/water contact in the productive formation or that the productive formation underlying the land is devoid of oil or gas in commercial quantities.

Celeste C. Grynberg, 96 IBLA 87 (Mar. 9, 1987)

Under 30 U.S.C. § 226(b) (1982), lands within the KGS of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected, notwithstanding the fact the offer was filed prior to such determination. A delay in adjudication of the offer to allow revision of procedures for determining KGS boundaries is reasonable where it is necessary to ensure lands properly deemed within a KGS are leased competitively as required by statute.

An applicant for a noncompetitive oil and gas lease who challenges a determination that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error by a preponderance of the evidence.

Jack J. Grynberg, 96 IBLA 316 (Apr. 2, 1987)

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of $2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

A BLM determination that land leased for oil and gas is within a known geologic structure will not be overturned where the evidence establishes that land within the lease is included within the limits of productive formations as determined by the composite isopach of several productive formations and the lessee fails to present a preponderance of evidence to the contrary.

Lewis & Clark Exploration Co., 97 IBLA 171 (May 7, 1987)

Where a record is shown, by a preponderance of the evidence, to be insufficient to support a BLM decision extending a KGS, the determination is reversed.

Richard E. O'Connell, 98 IBLA 283 (July 20, 1987)

An applicant seeking a noncompetitive oil and gas lease for acquired lands who challenges a determination by BLM that land is within a known geological structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error. The Board of Land Appeals may properly consider data compiled both before and after a KGS determination in reviewing the merits of such determination.

Carolyn J. McCutchin, 99 IBLA 29 (Aug. 26, 1987)

BLM properly rejects noncompetitive oil and gas lease offers for land determined to be within the known geologic structure of a producing oil or gas field where the offeror fails to establish by a preponderance of the evidence that the land is not presumptively productive and where BLM, hence, justifiably relies on its geological opinion that the land is generally underlain by fractured reservoirs radiating from faults which at

OIL AND GAS LEASES--Continued

KNOWN GEOLOGIC STRUCTURE--Continued

certain points have been productive of oil and gas and the offeror at best presents a contrary opinion.

Beard Oil Co., et al., 99 IBLA 40 (Sept. 8, 1987)

Regulation 43 CFR 3103.2-2(a) requires the holder of a noncompetitive oil and gas lease to pay rental of $3 per acre or fraction thereof for the sixth and each succeeding lease year.

Dorothy Radant, Robert Radant, 99 IBLA 84 (Sept. 9, 1987)

Where a party challenges BLM's designation of certain lands as being within a known geologic structure on the basis that BLM erred in calculating net pay values on a well log, that determination will not be disturbed on appeal when the party fails to show by a preponderance of evidence that BLM, in fact, erred.

Vera Kochergan, 99 IBLA 194 (Oct. 13, 1987)

BLM may properly designate lands as within a known geologic structure (KGS) of a producing oil or gas field even though such lands are not underlain by a dome or anticline. Lands underlain by stratigraphic traps of oil or gas may properly be designated as KGS lands, and such lands may be leased only by competitive bidding.

Carol Ann Hoffman, 100 IBLA 139 (Dec. 2, 1987)

LANDS SUBJECT TO

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and priority among them is determined by drawing in accordance with 43 CFR 1821.2-3.

Roberts & Koch, 95 IBLA 239 (Jan. 16, 1987)

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer to the extent that it covers acquired military lands formerly included in an oil and gas lease which was relinquished. Lands formerly embraced within oil and gas leases that have been relinquished, to the extent they are subject to noncompetitive leasing, must be leased pursuant to the simultaneous filing procedures at 43 CFR Subpart 3112.

A detailed reevaluation to determine if the lands are within a known geologic structure is a statutory prerequisite to leasing acquired military lands within the City of Corpus Christi, Texas, pursuant to the Act of Oct. 19, 1984, P.L. 98-529, 98 Stat. 2697. A noncompetitive lease may not be issued for such lands where there is no indication in the record that such an evaluation has been performed.

Robert D. Bluntzer, 95 IBLA 247 (Jan. 23, 1987)

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

In those cases where the mineral interest in the land will vest in the United States at some future date, a future interest oil and gas lease offer may be filed by a party qualified to file such an offer. When a noncompetitive oil and gas lease offer filed subsequent to vesting is rejected because an oil and gas lease had been issued to an offeror who had filed an offer prior to the date the minerals had vested in the United States, it must be shown that the offeror who was prior in time was qualified to file a future interest oil and gas lease offer. If the record does not contain evidence the prior offeror was so qualified, the decision rejecting the second offer will be set

OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

aside and the casefile remanded to BLM for a determination regarding the proper qualification of the first offeror, and, if necessary, cancellation of the lease issued to the first offeror.

F. F. Schell et al., 100 IBLA 296 (Dec. 22, 1987)

NONCOMPETITIVE LEASES

BLM must cancel a noncompetitive oil and gas lease of acquired lands where the lessee failed to fully pay the first year's advance rental at the time of submission of his lease offer, in accordance with 43 CFR 3103.3-1 (1979), the deficiency was more than 10 percent and a subsequent lease offer was filed by a qualified third party.

Sun Exploration & Production Co., 95 IBLA 140 (Jan. 12, 1987)

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and priority among them is determined by drawing in accordance with 43 CFR 1821.2-3.

Roberts & Koch, 95 IBLA 239 (Jan. 16, 1987)

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer to the extent that it covers acquired military lands formerly included in an oil and gas lease which was relinquished. Lands formerly embraced within oil and gas leases that have been relinquished, to the extent they are subject to noncompetitive leasing, must be leased pursuant to the simultaneous filing procedures at 43 CFR Subpart 3112.

Robert D. Bluntzer, 95 IBLA 247 (Jan. 23, 1987)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

A simultaneous oil and gas lease application is properly rejected when the executed lease forms are not received by the proper BLM office within 30 days from the date applicant receives the lease forms sent for execution.

Marion Bernice Phillips, 95 IBLA 297 (Jan. 29, 1987)

Lands which are not within a known geological structure of a producing oil or gas field, or a favorable petroleum geological province in Alaska, which have been previously leased are subject to leasing only under the regulations at 43 CFR Subpart 3112. Those regulations provide that lands which have been offered and for which no applications have been received during the filing period are available for leasing by an over-the-counter lease offer.

Michigan Oil Co., 96 IBLA 1 (Feb. 25, 1987)

BLM is required to reject a simultaneous noncompetitive oil and gas lease application drawn with priority if the land is found to be within a known geologic structure of a producing oil or gas field, even if the determination is made after the drawing and during a lengthy delay in the processing of the application occasioned by Departmental review of noncompetitive leasing in the Wyoming overthrust belt area.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

The Board will sustain a determination by BLM that land in a noncompetitive oil and gas lease is situated within the known geologic structure of a producing oil or gas field where the lessee has not established by a preponderance of the evidence that the land is downdip of the gas/water contact in the productive formation or that the productive formation underlying the land is devoid of oil or gas in commercial quantities.

Celeste C. Grynberg, 96 IBLA 87 (Mar. 9, 1987)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

Under 30 U.S.C. § 226(b) (1982), lands within the KGS of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected, notwithstanding the fact the offer was filed prior to such determination. A delay in adjudication of the offer to allow revision of procedures for determining KGS boundaries is reasonable where it is necessary to ensure lands properly deemed within a KGS are leased competitively as required by statute.

An applicant for a noncompetitive oil and gas lease who challenges a determination that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error by a preponderance of the evidence.

Jack J. Grynberg, 96 IBLA 316 (Apr. 2, 1987)

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

An over-the-counter offer to lease for oil and gas is properly rejected by BLM where the offer is intended to be the joint offer of two persons but only one person has signed the offer.

Robert L. Fuller, Sonia Fuller, 98 IBLA 93 (June 11, 1987)

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

Where a record is shown, by a preponderance of the evidence, to be insufficient to support a BLM decision extending a KGS, the determination is reversed.

Richard E. O'Connell, 98 IBLA 283 (July 20, 1987)

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 3111.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

While defective regular "over-the-counter" noncompetitive oil and gas lease offers may be cured prior to adjudication by BLM, defects may not be cured by submission of additional material after the proper rejection of the offer.

Isabelle C. Chang, 99 IBLA 282 (Oct. 22, 1987)

In those cases where the mineral interest in the land will vest in the United States at some future date, a future interest oil and gas lease offer may be filed by a party qualified to file such an offer. When a noncompetitive oil and gas lease offer filed subsequent to vesting is rejected because an oil and gas lease had been issued to an offeror who had filed an offer prior to the date the minerals had vested in the United States, it must be shown that the offeror who was prior in time was qualified to file a future interest oil and gas lease offer. If the record does not contain evidence the prior offeror was so qualified, the decision rejecting the second offer will be set

OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

aside and the casefile remanded to BLM for a determination regarding the proper qualification of the first offeror, and, if necessary, cancellation of the lease issued to the first offeror.

F. F. Schell et al., 100 IBLA 296 (Dec. 22, 1987)

OFFERS TO LEASE

Refunds of advance rental payments tendered in connection with noncompetitive over-the-counter oil and gas lease offers which are rejected or withdrawn prior to lease issuance are properly issued to the offeror(s), the real party(ies) in interest, pursuant to sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1982).

Frederick Alan Maxwell, 95 IBLA 267 (Jan. 27, 1987)

The attorney-in-fact regulation, 43 CFR 3112.6-1(b)(1), prohibits an attorney-in-fact from executing a lease offer under the simultaneous leasing procedures, 43 CFR Subpart 3112, for one party when he is authorized to file offers as an attorney-in-fact for another. It specifically requires that a power-of-attorney document expressly prohibit the attorney-in-fact from filing offers on behalf of any other participant. If a person whose power of attorney contains the prohibition signs a lease offer on behalf of another party, he violates the terms of his power of attorney.

Texaco Inc., 95 IBLA 397 (Feb. 24, 1987)

Lands which are not within a known geological structure of a producing oil or gas field, or a favorable petroleum geological province in Alaska, which have been previously leased are subject to leasing only under the regulations at 43 CFR Subpart 3112. Those regulations provide that lands which have been offered and for which no applications have been

OIL AND GAS LEASES--Continued

OFFERS TO LEASE--Continued

received during the filing period are available for leasing by an over-the-counter lease offer.

Michigan Oil Co., 96 IBLA 1 (Feb. 25, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

An over-the-counter offer to lease for oil and gas is properly rejected by BLM where the offer is intended to be the joint offer of two persons but only one person has signed the offer.

Robert L. Fuller, Sonia Fuller, 98 IBLA 93 (June 11, 1987)

The drawing of an oil and gas lease applicant's name under the simultaneous leasing system does not create any property or contract right in the party whose name is drawn, but merely establishes the priority for purposes of filing a noncompetitive lease offer. It creates only a right to have the application fairly considered under the applicable statutory criteria. Timely return of executed lease forms and payment of the first year's rental constitutes an offer to lease. An offer to lease is not accepted until the lease forms are signed by the authorized BLM officer.

The fact that land has been posted for filing of applications under the simultaneous leasing system does

OIL AND GAS LEASES--Continued

OFFERS TO LEASE--Continued

not bind the Secretary to lease the land noncompetitively, nor is the Secretary bound to lease the land when a qualified applicant has been selected. A noncompetitive lease offer must be rejected whenever it is determined that the land for which the offer is made is within a known geologic structure.

There is no time limit within which a decision to reject a lease offer or issue a lease must be made.

Shaw Resources, Inc., et al., 98 IBLA 96 (June 12, 1987)

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 3111.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

BLM properly rejects noncompetitive oil and gas lease offers for land determined to be within the known geologic structure of a producing oil or gas field where the offeror fails to establish by a preponderance of the evidence that the land is not presumptively productive and where BLM, hence, justifiably relies on its geological opinion that the land is generally underlain by fractured reservoirs radiating from faults which at certain points have been productive of oil and gas and the offeror at best presents a contrary opinion.

Beard Oil Co., et al., 99 IBLA 40 (Sept. 8, 1987)

OIL AND GAS LEASES--Continued

PRODUCTION

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

REINSTATEMENT

The Secretary of the Interior may reinstate a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to pay timely was justifiable or not due to a lack of reasonable diligence. Under 43 CFR 3108.2-1(a), a remittance postmarked by the U.S. Postal Service on or before the anniversary date and received in the proper office no later than 20 days after such anniversary date is timely filed. However, that regulation does not alter the anniversary date and where the rental payment arrives within that time period, but in an envelope postmarked after the anniversary date, even though the anniversary date fell on a day on which the proper office to receive payment was closed, the lessee did not exercise reasonable diligence.

William R. Barthold, 98 IBLA 293 (July 20, 1987)

Where a tender of payment of the rental for an oil and gas lease more than 5 months before the anniversary date was promptly returned to the lessee with an explanation that it was a duplicate payment for the

OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

present lease year and a reminder of the next anniversary date by which rent is due, a decision holding the lease to have terminated by operation of law and denying a petition for reinstatement under 30 U.S.C. § 188(c) (1982) (class I) will be affirmed if the rental payment is not received thereafter until more than 20 days after the anniversary date.

Sue A. Hartman, 99 IBLA 1 (Aug. 11, 1987)

RENTALS

BLM must cancel a noncompetitive oil and gas lease of acquired lands where the lessee failed to fully pay the first year's advance rental at the time of submission of his lease offer, in accordance with 43 CFR 3103.3-1 (1979), the deficiency was more than 10 percent and a subsequent lease offer was filed by a qualified third party.

Sun Exploration & Production Co., 95 IBLA 140 (Jan. 12, 1987)

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreements within 30 days of receipt of notice to do so, the application is properly rejected.

David A. Gitlitz, 95 IBLA 221 (Jan. 15, 1987)

Refunds of advance rental payments tendered in connection with noncompetitive over-the-counter oil and gas lease offers which are rejected or withdrawn prior to lease issuance are properly issued to the offeror(s), the real party(ies) in interest, pursuant to sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1982).

Frederick Alan Maxwell, 95 IBLA 267 (Jan. 27, 1987)

OIL AND GAS LEASES--Continued

RENTALS--Continued

A simultaneous oil and gas lease application is properly rejected when the executed lease forms are not received by the proper BLM office within 30 days from the date applicant receives the lease forms sent for execution.

Marion Bernice Phillips, 95 IBLA 297 (Jan. 29, 1987)

While a potential assignee of an oil and gas lease may pay the annual rental, BLM is under no obligation to give the potential assignee a courtesy notice of rental due prior to the lease anniversary date.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of $2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

Lewis & Clark Exploration Co., 97 IBLA 171 (May 7, 1987)

Where a tender of payment of the rental for an oil and gas lease more than 5 months before the anniversary date was promptly returned to the lessee with an explanation that it was a duplicate payment for the present lease year and a reminder of the next anniversary date by which rent is due, a decision holding the lease to have terminated by operation of law and denying a petition for reinstatement under 30 U.S.C. § 188(c) (1982) (class I) will be affirmed if the rental payment is not received thereafter until more than 20 days after the anniversary date.

Sue A. Hartman, 99 IBLA 1 (Aug. 11, 1987)

OIL AND GAS LEASES--Continued

RENTALS--Continued

Regulation 43 CFR 3103.2-2(a) requires the holder of a noncompetitive oil and gas lease to pay rental of $3 per acre or fraction thereof for the sixth and each succeeding lease year.

Dorothy Radant, Robert Radant, 99 IBLA 84 (Sept. 9, 1987)

ROYALTIES

Where the lessee under an Outer Continental Shelf oil and gas lease commits 10 percent of its gas production from the lease to buyer A and enters into a transportation agreement with buyer A to transport the uncommitted production to other buyers, the value of a "transportation allowance" (a percentage of the natural gas being delivered to buyer A as compensation for transportation service) will be calculated on the basis of a value determination letter pertaining to the sale of 10 percent of the production to buyer A and not warranty contract prices for sale of gas to other buyers.

Amoco Production Co., 96 IBLA 347 (Apr. 8, 1987)

A hearing will be ordered where the record is not clear whether before 1974 the Department exempted oil or gas produced from leases on the Outer Continental Shelf from royalty if it was used for production or operations outside the lease or unit from which it was produced.

Exxon Co., U.S.A., et al., 98 IBLA 218 (July 1, 1987)
94 I.D. 329

The Secretary of the Interior has discretion to suspend overriding royalty interests in excess of 17-1/2 percent pursuant to 43 CFR 3103.3-3. If on appeal an appellant does not show, by a preponderance of available evidence, that rejection of an application for suspension was erroneous the decision rejecting the application will be upheld.

Wood, McShane & Thams, 99 IBLA 132 (Sept. 24, 1987)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Under North Dakota law, when a county conveys lands acquired through tax proceedings, it must convey all its interest in such lands; an attempted reservation of any part of its interest is void. Where such lands were subsequently acquired by the United States through condemnation proceedings, BLM properly declared the counties' attempted reservation of royalty and mineral interests invalid.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

The Department is authorized to reduce the royalty rate on a lease reinstated pursuant to sec. 401 of the Federal Oil and Gas Royalty Management Act at a higher royalty rate where "there are uneconomic or other circumstances which could cause undue hardship." 30 U.S.C. § 188(i)(2) (1982). Where the lessee has offered evidence that a reinstated competitive lease was extended by drilling over the lease expiration date, that a producing well was subsequently completed, and that the well will never reach payout, a decision rejecting a petition without applying the statutory criteria will be set aside and remanded for further consideration.

Alta Energy Corp., 100 IBLA 313 (Dec. 28, 1987)

STIPULATIONS

The Bureau of Land Management may properly reject an over-the-counter noncompetitive oil and gas lease offer when special stipulations are not executed and filed with it within the time limit specified.

William H. Kerlin, Jr., 95 IBLA 377 (Feb. 19, 1987)

Where a Notice of Sale of competitive leases expressly notes that a particular parcel will be subject to special stipulations designed to protect big game winter range habitat and the precise nature of the restrictions would be made clear upon inquiry to the State Office as provided by 43 CFR 3120.4-1, an offeror

OIL AND GAS LEASES--Continued

STIPULATIONS--Continued

will be deemed to have agreed to accept such stipulation even though it was not specifically described in the Notice of Sale.

Exxon Corp., 97 IBLA 330 (May 21, 1987)

SUSPENSIONS

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

Where an oil and gas lease, issued after the enactment of the Federal Land Policy and Management Act of 1976, embraces lands within a wilderness study area and the lessee is denied an application for permit to drill for failure to meet the nonimpairment standard, a subsequent request for suspension of operations and production will be adjudicated on the basis of whether or not at the time of issuance BLM encumbered the lease with a wilderness protection or no-surface-occupancy stipulation. The suspension policy, as set forth in the "Interim Management Policy and Guidelines for Lands under Wilderness Review," is to grant a suspension for such a lease issued without either of those stipulations.

Amoco Production Co., et al. (On Reconsideration), 96 IBLA 260 (Mar. 26, 1987)

OIL AND GAS LEASES--Continued

SUSPENSIONS--Continued

Rejection of an application for a right-of-way for road access across Federal lands not under lease to a drill site on a Federal oil and gas lease may be reasonable where it is filed too close to the expiration date of the lease (after which the right-of-way would be meaningless) to allow processing consistent with the Department's statutory obligations under the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976. However, where an application for suspension of operations is filed prior to lease expiration to obtain time for approval of the right-of-way, rejection of the right-of-way application will be set aside as premature in the absence of an adjudication of the request for suspension.

The Secretary of the Interior is authorized to suspend oil and gas leases in the interest of conservation where action cannot be taken on an application because of the time needed to comply with requirements of the National Environmental Policy Act of 1969. Where the lessee's inability to commence drilling prior to lease expiration cannot be attributed to any order, delay, or inaction by any Federal agency, the Secretary is not obligated to grant a suspension but has the discretion to do so in the exercise of his informed discretion upon a finding that it is in the interest of conservation.

John March, 98 IBLA 143 (June 22, 1987)

The Secretary of the Interior has the discretionary authority to suspend an oil and gas lease in the interest of conservation where drilling under prevailing conditions would damage the lease environment. Although a suspension of operations may be granted retroactively after the lease expiration date, a prerequisite is an application filed prior to the expiration of the lease. In the absence of a timely filed application, there is no lease in existence which may be suspended.

Mobil Producing Texas & New Mexico, Inc., 99 IBLA 5 (Aug. 11, 1987)

OIL AND GAS LEASES--Continued

TERMINATION

Where an oil and gas lease in its primary term is partially committed to a unit agreement, the term of the nonunitized lease created by segregation is the remainder of the primary term of the parent lease but not less than 2 years from the date of segregation.

Raymond T. Duncan et al., 96 IBLA 352 (Apr. 8, 1987)

A decision disallowing a pending partial assignment of an oil and gas lease will be affirmed where, prior to approval of the partial assignment, the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental for the lands described in the partial assignment prior to the anniversary date.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

The provision of 30 U.S.C. § 184(h)(2) (1982) protecting the interests of bona fide purchasers from certain action by the Department to cancel an oil and gas lease is not applicable to expiration of a lease by operation of law under 30 U.S.C. § 226 (1982).

Landmark Exploration Co., 97 IBLA 96 (Apr. 29, 1987)

The Secretary of the Interior may reinstate a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to pay timely was justifiable or not due to a lack of reasonable diligence. Under 43 CFR 3108.2-1(a), a remittance postmarked by the U.S. Postal Service on or before the anniversary date and received in the proper office no later than 20 days after such anniversary date is timely filed. However, that regulation does not alter the anniversary date and where the rental payment arrives within that time period, but in an envelope postmarked after the anniversary date, even though the anniversary date fell on a day on which the

OIL AND GAS LEASES--Continued

TERMINATION--Continued

proper office to receive payment was closed, the lessee did not exercise reasonable diligence.

William R. Barthold, 98 IBLA 293 (July 20, 1987)

Where a tender of payment of the rental for an oil and gas lease more than 5 months before the anniversary date was promptly returned to the lessee with an explanation that it was a duplicate payment for the present lease year and a reminder of the next anniversary date by which rent is due, a decision holding the lease to have terminated by operation of law and denying a petition for reinstatement under 30 U.S.C. § 188(c) (1982) (class I) will be affirmed if the rental payment is not received thereafter until more than 20 days after the anniversary date.

Sue A. Hartman, 99 IBLA 1 (Aug. 11, 1987)

Extension of an oil and gas lease by reason of drilling over the expiration date of the lease requires that drilling operations be ongoing on the expiration date and be conducted in the manner in which someone seriously looking for oil or gas in that area could be expected to proceed. A decision holding a lease to have expired will be affirmed where the well on the lease was abandoned prior to the lease expiration date, notwithstanding the lessee's intent to drill an additional well.

Mobil Producing Texas & New Mexico, Inc., 99 IBLA 5 (Aug. 11, 1987)

UNIT AND COOPERATIVE AGREEMENTS

Where BLM approves a revision to a participating area under a unit agreement based on a determination that a unit well is capable of producing unitized substances in quantities sufficient to repay the costs of drilling, completing, and producing the well with a reasonable profit, the decision will be affirmed on

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

appeal unless the appellant establishes by a preponderance of the evidence the well is not a paying well.

Monsanto Oil Co., et al., 95 IBLA 112 (Jan. 6, 1987)

Where a lease committed in part to a unit agreement is extended by reason of production at the time of commitment, the segregated nonunitized lease is extended for the life of such production but not less than 2 years from the date of segregation pursuant to sec. 17(j) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(j) (1982).

Anadarko Production Co., 96 IBLA 320 (Apr. 7, 1987)
94 I.D. 129

Where an oil and gas lease in its primary term is partially committed to a unit agreement, the term of the nonunitized lease created by segregation is the remainder of the primary term of the parent lease but not less than 2 years from the date of segregation.

Raymond T. Duncan et al., 96 IBLA 352 (Apr. 8, 1987)

Departmental regulations at 43 CFR Part 3160 governing onshore oil and gas operations apply to facilities located on private leases which participate with Federal and/or Indian leases under a unit agreement approved by the Department's authorized officer. Accordingly, a unit operator is required to submit site facility diagrams of facilities located on such private leases under 43 CFR 3162.7-4(d)(1) to aid BLM in accounting for production and royalties allocated to the Federal and/or Indian leases.

Tricentrol United States, Inc., 97 IBLA 387 (May 27, 1987)

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

Under 30 U.S.C. § 226(j) (1982), the Department is without authority to create separate leases out of a single lease upon its partial elimination from a unit plan by contraction of the unit area. Thus, partial elimination of a lease has no effect on its tenure.

Under 30 U.S.C. § 226(j) (1982), any lease partially committed to a unit plan shall be segregated into separate leases as to the lands committed and the lands not committed. Thereafter, they are distinct leases, and are administered independently of each other. The statute does not give the segregated nonunitized portion of a lease a new term, but provides that the lease shall continue in force and effect for the term thereof, but for not less than 2 years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities. The word "term" here refers to the entire term of the lease, i.e., the period the lease has to run, whether that period were definite or indefinite, as it existed on the date of segregation.

When a lease is segregated upon partial commitment to a unit agreement pursuant to 30 U.S.C. § 226(j) (1982), production on one segregated lease can extend the term of the other segregated lease only if the segregation occurs when the base lease is in an extended term because of production and not in a fixed term of years.

Under 30 U.S.C. § 226(j) (1982), any lease which shall be eliminated from any approved unit plan and any lease which shall be in effect at the termination of such a plan shall continue in effect for the original term thereof, but for not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities. This provision is mandatory and leaves no room for the exercise of discretion. It applies to any lease eliminated from a unit plan without exception.

If a lease is no longer in its original term, but is held by production at the time of its elimination from a unit, it continues under 30 U.S.C. § 226(j) (1982), for a fixed term of 2 years and so long thereafter as oil or gas is produced in paying quantities.

The legislative history of the provision of the Mineral Leasing Act covering unitization of Federal leases, 30 U.S.C § 226(j) (1982), contains clear and specific evidence of legislative intent that the provisions concerning elimination of leases from units

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

and segregation of leases were intended to benefit lessees by encouraging the separate development of nonunitized lands. These provisions were not intended to allow such land to be held by production from other leases.

Celsius Energy Co., Southland Royalty Co., 99 IBLA 53 (Sept. 8, 1987) 94 I.D. 394

Where unit termination coincides with the conclusion of the primary term of a producing lease committed to said unit, the lease is extended by 30 U.S.C. § 226(j) (1982), for a fixed term of 2 years and is not regarded as held by production during this 2-year period.

Pennzoil Co., 99 IBLA 245 (Oct. 20, 1987)

The participating area established pursuant to a unit agreement may be revised to include additional lands then regarded as reasonably proved productive of unitized substances in paying quantities, or which are necessary for unit operations. Lands utilized for water injection wells may be added to the participating area if those wells improve recovery of unitized substances in the participating area, since those lands may be considered necessary for unit operations. However, where lands are added to a participating area on the basis that they are necessary for unit operations, the record on appeal must show a rational basis for that determination. Where it does not, the BLM decision to include certain lands will be set aside.

Champlin Petroleum Co., 100 IBLA 157 (Dec. 3, 1987)

WELL CAPABLE OF PRODUCTION

Where BLM approves a revision to a participating area under a unit agreement based on a determination that a unit well is capable of producing unitized substances in quantities sufficient to repay the costs of drilling, completing, and producing the well with a reasonable profit, the decision will be affirmed on

OIL AND GAS LEASES--Continued

WELL CAPABLE OF PRODUCTION--Continued

appeal unless the appellant establishes by a preponderance of the evidence the well is not a paying well.

Monsanto Oil Co., et al., 95 IBLA 112 (Jan. 6, 1987)

BLM may properly require the operator of a communitized area to conduct a 60-day test of a well pursuant to 43 CFR 3162.4-2(b), where the communitization agreement and the leases thereunder are each held in an extended term and the well at issue has been shut in for 2 years.

Byron Oil Industries, Inc., 100 IBLA 84 (Nov. 30, 1987)

OUTER CONTINENTAL SHELF LANDS ACT
(See also Oil & Gas Leases--if included in this Index.)

GENERALLY

If the terms of a Federal-State cooperative agreement entered into pursuant to 43 U.S.C. § 1352 (1982), provide that an oil and gas lease issued by the Federal Government is to be issued and administered pursuant to Federal laws, Federal laws and regulations pertaining to release of confidential information will apply. If a decision to release such information comports with Federal law the release of the information is not a breach of discretionary authority.

Shell Western Exploration & Production, Inc., 96 IBLA 244 (Mar. 24, 1987)

OIL AND GAS LEASES

Where the lessee under an Outer Continental Shelf oil and gas lease commits 10 percent of its gas production from the lease to buyer A and enters into a transportation agreement with buyer A to transport the uncommitted production to other buyers, the value of a "transportation allowance" (a percentage of the natural gas being delivered to buyer A as compensation for transportation service) will be calculated on the basis of a value determination letter pertaining to the sale of 10 percent of the production to buyer A and not

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

warranty contract prices for sale of gas to other buyers.

Amoco Production Co., 96 IBLA 347 (Apr. 8, 1987)

A hearing will be ordered where the record is not clear whether before 1974 the Department exempted oil or gas produced from leases on the Outer Continental Shelf from royalty if it was used for production or operations outside the lease or unit from which it was produced.

Exxon Co., U.S.A., et al., 98 IBLA 218 (July 1, 1987)
94 I.D. 329

REFUNDS

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), confers authority upon the Secretary of the Interior to approve refunds for overpayments arising from outer continental shelf leases and also authorizes the Secretary of the Treasury to make the payments.

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), permits requests for refunds only within 2 years of the date payment is received by the appropriate office.

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), requires requests for refunds be in writing, but does not specify the form the writing must take or its substantive contents. Requests arising after the date this opinion issues should be in writing, identify the claimant, the lease affected, and the reasons a refund is sought.

Shell Offshore, Inc., 96 IBLA 149 (Mar. 17, 1987)
94 I.D. 69

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), authorizes the Secretary of the Interior to approve refunds for overpayments made in regard to Outer Continental Shelf leases. The Secretary's authority is conditioned upon a request being filed within 2 years after the date a payment is made. A payment is made when it is tendered to the appropriate agency.

Standards set forth in an opinion by the Solicitor cannot be applied as substantive requirements governing requests for refunds. The notice which must be filed to request a refund under 43 U.S.C. § 1339 (1982) must be distinguished from the proof necessary to substantiate a refund request.

Conoco Inc., et al., 96 IBLA 384 (Apr. 14, 1987)

PATENTS OF PUBLIC LANDS

GENERALLY

A patent of land issued by the proper officers of the United States is presumed to be valid and to pass title.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

CORRECTIONS

BLM may properly reject an application to correct a homestead patent to include certain land where, although the original patentee may have intended to enter that land, the applicant acquired the patented homestead with a specific disclaimer of any transfer of the land and, thus, has no equitable interest in the land.

Arthur Warren Jones et al., 97 IBLA 253 (May 13, 1987)

PATENTS OF PUBLIC LANDS--Continued

EFFECT

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuangaruak, Mollie Itta, Wilber Ahtuangaruak, 97 IBLA 261 (May 13, 1987)

PATENTS OF PUBLIC LANDS--Continued

EFFECT--Continued

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are subject to location under the mining laws when Congress has expressly authorized mineral location of reserved minerals in the legislation providing for the reservation. Sec. 8 of the Taylor Grazing Act, 43 U.S.C. § 315g(d) (1970).

A patent of land issued by the proper officers of the United States is presumed to be valid and to pass title.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of

PATENTS OF PUBLIC LANDS--Continued

EFFECT--Continued

statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

RESERVATIONS

Removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

As provided by 43 CFR 3811.2-9, lands patented with mineral reservations to the United States under the Taylor Grazing Act, 43 U.S.C. § 315g (1970), are subject to appropriation under the mining or mineral leasing laws for the reserved minerals.

Edward Lore, 97 IBLA 340 (May 21, 1987)

Amax Specialty Metals Corp., 100 IBLA 60 (Nov. 24, 1987)

A patent issued pursuant to the Homestead Act of May 20, 1862, as amended, 43 U.S.C. § 161 (1976), cannot be construed as reserving to the United States minerals not specifically reserved therein.

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are subject to location under the mining laws when Congress has expressly authorized mineral location of reserved minerals in the legislation providing for the reservation. Sec. 8 of the Taylor Grazing Act, 43 U.S.C. § 315g(d) (1970).

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

PATENTS OF PUBLIC LANDS--Continued

SUITS TO CANCEL

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

PAYMENTS
(See also Accounts--if included in this Index.)

GENERALLY

A single personal check covering four competitive oil and gas lease bid deposits is not an acceptable form of remittance under 43 CFR 3120.4-1, which requires remittances to be submitted in the form specified in the competitive sale notice, when that notice requires bidders to submit separate bids with a bid deposit by guaranteed remittance, i.e., cash, cashier's check, or postal money order.

George H. Fentress, 99 IBLA 184 (Oct. 13, 1987)

REFUNDS

Refunds of advance rental payments tendered in connection with noncompetitive over-the-counter oil and gas lease offers which are rejected or withdrawn prior to lease issuance are properly issued to the offeror(s), the real party(ies) in interest, pursuant to sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1982).

Frederick Alan Maxwell, 95 IBLA 267 (Jan. 27, 1987)

PAYMENTS--Continued

REFUNDS--Continued

If an appellant fails to tender the first year's rental and filing fee when appealing from a decision that a simultaneous oil and gas lease application is unacceptable, the appeal will be dismissed for failure to comply with 43 CFR 3112.3(h). If, however, the first year's rental and filing fee have previously been tendered, and have not been refunded at the time of filing a notice of appeal, the previous submittal will suffice.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

PUBLIC LANDS
(See also Accretion, Avulsion, Boundaries, Reliction, Surveys of Public Lands--if included in this Index.)

GENERALLY

Under North Dakota law, when a county conveys lands acquired through tax proceedings, it must convey all its interest in such lands; an attempted reservation of any part of its interest is void. Where such lands were subsequently acquired by the United States through condemnation proceedings, BLM properly declared the counties' attempted reservation of royalty and mineral interests invalid.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

ADMINISTRATION

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

PUBLIC LANDS--Continued

ADMINISTRATION--Continued

The Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

JURISDICTION OVER

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment

PUBLIC LANDS--Continued

JURISDICTION OVER--Continued

for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuangaruak, Mollie Itta, Wilber Ahtuangaruak, 97 IBLA 261 (May 13, 1987)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Under North Dakota law, when a county conveys lands acquired through tax proceedings, it must convey all its interest in such lands; an attempted reservation of any part of its interest is void. Where such lands were subsequently acquired by the United States through condemnation proceedings, BLM properly declared the counties' attempted reservation of royalty and mineral interests invalid.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

PUBLIC LANDS--Continued

JURISDICTION OVER--Continued

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

LEASES AND PERMITS

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

SPECIAL USE PERMITS

BLM may properly cause the holder of a special recreation permit for commercial use of a wild and scenic river to forfeit two scheduled trips where the evidence establishes that, in the preceding year's regulated use period, the permittee launched a scheduled trip without checking in at the necessary location on the day of the launch, as required by stipulations incorporated in the permit.

BLM may properly place the holder of a special recreation permit for commercial use of a wild and scenic river on a probationary status where the evidence establishes that the permittee gave his trip card to someone other than a bona fide employee, who then conducted the scheduled trip, thereby effecting

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

a partial assignment of his permit in violation of the stipulations incorporated in his permit.

Robert L. Snook d.b.a. Beaver State Adventures, 100 IBLA 151 (Dec. 3, 1987)

PUBLIC RECORDS
(See also Administrative Procedure, Confidential Information--if included in this Index.)

"Notation rule." Where an Alaska Native corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face in that the land selected is not legally subject to such selection under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

PUBLIC SALES

BIDDING

BLM may properly decide to make a direct sale of an isolated parcel of public land to an existing grazing user, who is also one of the adjoining landowners, rather than engage in regular or modified competitive bidding, under sec. 203(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(f) (1982).

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

RECLAMATION LANDS
(See also Irrigation Claims, Rights-of-Way--if included in this Index.)

GENERALLY

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

Kenneth Carter, 98 IBLA 100 (June 12, 1987)

Land acquired by the United States does not become public land by the mere process of its acquisition and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Ted Thompson, 98 IBLA 251 (July 7, 1987)

RECREATION AND PUBLIC PURPOSES ACT

Grazing use of land administered by a county government as a result of a grant to that governmental body pursuant to the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), will not be credited as "historical use" for the purposes of adjudicating the competing qualifications of grazing applications pursuant to 43 CFR 4130.1-2.

Lewis M. Webster v. Bureau of Land Management, 97 IBLA 1 (Apr. 16, 1987)

REGIONAL CORPORATION SELECTIONS

In the absence of a Master Title Plat or other appropriate land-use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected lands from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation rule as a bar to mining claims located during the pendency of the regional selection.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

REGULATIONS
(See also Administrative Procedure--if included in this Index.)

GENERALLY

When subsequent to execution of a mineral material sales contract, the Department has amended the regulation providing for automatic termination of such a contract for failure to submit an in lieu of minimum annual production payment on or before the anniversary date by giving the authorized officer discretionary authority to terminate, the Board will set aside a BLM decision holding the contract to have automatically terminated and remand the case to BLM to allow the exercise of its discretion.

T. Brown Constructors, Inc., 95 IBLA 107 (Jan. 6, 1987)

REGULATIONS--Continued

GENERALLY--Continued

The Department is obligated to mail a copy of orders, instructions, or notices to the lessee of record under 43 CFR 3162.3 when such documents are served upon the operator designated by the lessee to engage in the actual conduct of operations on the leasehold.

Where 43 CFR 3163.3(a) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Exxon Corp., 95 IBLA 165 (Jan. 13, 1987)

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to have all meters functioning properly, and assess liquidated damages under 43 CFR 3163.3(a) for failure to timely comply with that notice by calibrating the meters. The $250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to shorten meter hoses in order to prevent the collection of fluid in low spots, and assess liquidated damages under 43 CFR 3163.3(a) for failure to comply with that notice. The $250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly require an oil and gas lessee to construct a berm around a tank in which produced water is stored, because BLM is authorized by Departmental regulations to issue instructions or orders relating to the protection of environmental quality. However, such a requirement may not be based upon a condition in the lessee's application for permit to drill requiring the construction of firewalls around tank batteries since a firewall is a wall to retain oil in case of its escape from a tank or to prevent the spread of burning oil.

William Perlman, 96 IBLA 181 (Mar. 18, 1987)

REGULATIONS--Continued

GENERALLY--Continued

Departmental regulation 43 CFR 3833.0-5(m), promulgated in Dec. 1982, treats as "timely filed" a mining claim recordation document received by the Bureau of Land Management within 20 days of the statutory deadline for annual mining claim recordation filings if transmitted in an envelope bearing a clearly dated postmark affixed by the United States Postal Service denoting the document was mailed on or before Dec. 30 of the filing year. This regulation took effect Dec. 30, 1982, and in accordance with United States v. Locke, 471 U.S 84, 102 n.14 (1985), it cannot be applied retroactively.

Lindsay Lee Lemons, 98 IBLA 75 (June 9, 1987)

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board in view of the suspension of that regulation.

The determination that an assessment for non-compliance with 43 CFR 3103.3(a) should be levied is discretionary, and the levy of an assessment is not automatic. The Board will set aside a BLM technical and procedural review decision that levy of an assessment is automatic and remand the case to allow BLM's exercise of discretion.

Mingo Oil Producers (On Reconsideration), 98 IBLA 133 (June 22, 1987)

A hearing will be ordered where the record is not clear whether before 1974 the Department exempted oil or gas produced from leases on the Outer Continental Shelf from royalty if it was used for production or operations outside the lease or unit from which it was produced.

Exxon Co., U.S.A., et al., 98 IBLA 218 (July 1, 1987)
94 I.D. 329

REGULATIONS--Continued

GENERALLY--Continued

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

APPLICABILITY

The Board of Land Appeals need not decide whether a permittee could retroactively take advantage of an amended regulation allowing for extensions of the abatement period where there is no evidence in the record which would show affirmatively the permittee's entitlement to such an extension, even if it were available.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

BINDING ON THE SECRETARY

BLM may condition approval of a right-of-way for an access road upon acceptance by the right-of-way applicant of stipulations imposing liability for any damage or injury incurred by the United States or third parties in connection with use of the right-of-way area by the applicant, where those stipulations reflect regulatory requirements which are binding on the Department.

Carl H. Alber, Jr., 100 IBLA 257 (Dec. 9, 1987)

FORCE AND EFFECT AS LAW

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979). It must be based on a grant of power by Congress and be promulgated in accordance with the requirements of the Administrative Procedure Act.

If a rule is substantive, it must be promulgated in accordance with the Administrative Procedure Act in

REGULATIONS--Continued

FORCE AND EFFECT AS LAW--Continued

order to have the force and effect of law. If, however, a rule is interpretive, the same proposition is true. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979).

Shell Offshore, Inc., 96 IBLA 149 (Mar. 17, 1987)
94 I.D. 69

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Western Slope Carbon, Inc., 98 IBLA 198 (June 29, 1987)

A notice published in the Federal Register, wherein BLM interprets and clarifies existing regulations to ensure compliance with regulatory provisions at 43 CFR 3102.5, is a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

INTERPRETATION

An assessment for failure to seal appropriate valves levied pursuant to 43 CFR 3163.3(j) may be vacated by the Board in view of the suspension of that regulation by the Bureau of Land Management and the change in Department policy regarding automatic assessments.

Hardy Salt Co., 96 IBLA 39 (Feb. 27, 1987)

REGULATIONS--Continued

INTERPRETATION--Continued

Where there has been a decrease in Federal lands available for grazing, BLM may impose a proportionate reduction among all the authorized users of a particular allotment as proportionate reduction is consistent with the reduction required under 43 CFR 4110.4-2(a).

B. G. Bunyard v. Bureau of Land Management, 96 IBLA 143 (Mar. 12, 1987)

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

Where 25 CFR 169.20 provides for the termination of a right-of-way for nonuse for a consecutive 2-year period for the purpose for which the right-of-way was granted, no provision of statute, regulation, or the right-of-way documents authorized the Bureau of Indian Affairs to excuse involuntary nonuse without the consent of the tribe.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from

REGULATIONS--Continued

INTERPRETATION--Continued

the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 3111.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

VALIDITY

The Board of Indian Appeals does not have authority to declare invalid a duly promulgated Departmental regulation.

Northern Natural Gas v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 124 (Mar. 2, 1987)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Western Slope Carbon, Inc., 98 IBLA 198 (June 29, 1987)

WAIVER

Departmental regulation 43 CFR 2653.6(b)(1) (1976) precluded Native groups from receiving land benefits under the Alaska Native Claims Settlement Act if the lands selected by them were in a wildlife refuge. However, Secretarial Order No. 3083 of June 17, 1982, issued pursuant to 43 CFR 2650.0-8 which permits the Secretary to waive any nonstatutory regulation promulgated to implement the Alaska Native Claims Settlement Act, waived the bar to conveyance of refuge lands.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

RENT

Where appellant fails to establish entitlement to reimbursement for alleged overcharges of rental, his claim for such reimbursement is properly denied.

Appeal of John R. Haugh, 7 OHA 87 (June 29, 1987)

Appeal of Robert W. Jones, 7 OHA 91 (June 29, 1987)

Appeal of Cyrus J. Sokoll, 7 OHA 95 (June 29, 1987)

The annual Consumer Price Index adjustment for Government-furnished quarters rental rates should be calculated from the month and year of the regional survey or reappraisal of the private rental market on which the rental rates were based.

Appeal of James E. Brooks, Roger L. Hamman, & Buddy L. Jensen, 7 OHA 124 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

In the Matter of the Rental Rate Appeal of Gary Gissell, 7 OHA 128 (Oct. 16, 1987)

In the Matter of the Rental Rate Appeal of Duncan Hollar, 7 OHA 131 (Oct. 16, 1987)

An appeal from a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

When an issue raised on appeal from a rental rate adjustment for Government-furnished quarters is appropriate for consideration by the agency under 41 CFR 114-52.301(d), the issue will be remanded for such consideration.

A rental rate adjustment for Government-furnished quarters will be upheld when the appellant fails to

RENT--Continued

submit evidence overcoming the agency's showing of regularity in the adjustment.

In the Matter of the Rental Rate Appeal of Robert E. Johnson, 7 OHA 134 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

A rental rate adjustment for Government-furnished quarters that is based on changes in the Consumer Price Index (CPI) is properly deferred 1 year when a rental rate survey is conducted within 6 months before or after the CPI adjustment is scheduled to be made.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

In the Matter of the Rental Rate Appeal of Ronald M. Mackie, 7 OHA 138 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

The annual Consumer Price Index adjustment to the rental rate for Government-furnished quarters may not be used as a vehicle to challenge a prior regional rental rate survey.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

Notification of a rental rate adjustment for Government-furnished quarters is timely if the notice

RENT--Continued

of adjustment is mailed to the tenant at least 30 days prior to implementation of the adjustment.

In the Matter of the Rental Rate Appeal of Randolph L. August, 7 OHA 143 (Oct. 16, 1987)

An administrative agency has authority to correct its own erroneous interpretation of law so long as the departure from prior practice is explained and shown not to be arbitrary or capricious.

In the Matter of the Rental Rate Appeal of Nancy A. Hunter, 7 OHA 148 (Oct. 16, 1987)

RES JUDICATA

Where a determination of Native group eligibility has been made by the Bureau of Indian Affairs pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the doctrine of administrative finality operates to bar the eligibility issue from consideration in an appeal from a decision approving lands for patent pursuant to sec. 14(h)(2) of the Act, 43 U.S.C. § 1613(h)(2) (1982).

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if the permittee failed to timely seek review of the notice of violation.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

RES JUDICATA--Continued

When a mining claim has properly been declared null and void for lack of discovery, a subsequent quitclaim deed from the claimant to a third party conveys nothing as the grantor has no interest which may be conveyed.

Vivian L. Ames et al., 99 IBLA 99 (Sept. 21, 1987)

RIGHTS-OF-WAY
(See also Indians, Reclamation Lands--if included in this Index.)

GENERALLY

The Bureau of Land Management may reserve a right-of-way for a segment of the Iditarod Trail in its approval of Native allotment applications. Reserving the right-of-way is an exercise of the discretion vested in the Secretary pursuant to sec. 7(h) of the National Trails System Act, 16 U.S.C. § 1246(h) (1982), and the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).

In the absence of a dispute as to a material fact, the due process rights of a Native allotment applicant are satisfied by the right to appeal to the Board of Land Appeals from the reservation of a public use right-of-way for a designated trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982), in the approval of a Native allotment application.

Clarence Lockwood et al., 95 IBLA 261 (Jan. 27, 1987)

Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761-1771 (1982), requires that a right-of-way application be approved prior to transporting water across public land for any mining purpose. Approval of a right-of-way application is within the discretion of the Secretary of the Interior. A decision by the Secretary's delegate, made in exercise of such discretion, will be affirmed in the absence of sufficient reason to disturb it.

Desert Survivors, 96 IBLA 193 (Mar. 19, 1987)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

Where BLM grants a communication site right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982) and the grantee fails to file an application for assignment as required by 43 CFR 2803.6-3, rental resulting from a subsequent appraisal may be properly assessed against the grantee. The period of assessment properly included that period the grantee, under a private arrangement, allowed another party to use the right-of-way.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

Where BLM issues a right-of-way grant which includes a provision stating that the grant is renewable under certain conditions, the grant does not automatically terminate on its expiration date but is subject to renewal in accordance with the stated terms and conditions, and 43 CFR 2803.6-5(a).

Coors Energy Co., 99 IBLA 37 (Sept. 8, 1987)

Where BLM determines, for the purpose of cost reimbursement, that under 43 CFR 2883.1-1(a)(3), an application for a temporary use permit for repair work on a right-of-way falls under Category IV, its decision will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Northwest Pipeline Corp., 99 IBLA 364 (Nov. 3, 1987)

ACT OF MARCH 4, 1911

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the

RIGHTS-OF-WAY--Continued

ACT OF MARCH 4, 1911--Continued

failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

ACT OF FEBRUARY 25, 1920

Although Federal oil and gas leasing is subject to extensive supervision by the Secretary of the Interior, and although the Secretary has broad discretion over whether or not to lease particular lands within the public domain, once he has granted a lease he may not derogate the rights acquired by the Federal lessee under the Mineral Leasing Act, 30 U.S.C. § 181 (1982), and the lease granted pursuant thereto.

Where, following issuance of a right-of-way grant for a crude oil pipeline across lands embraced by a Federal oil and gas lease, the lessee requests reconsideration of that grant complaining that the grant will interfere with present and future operations on its lease, and the record indicates the lessee was not provided notice prior to right-of-way issuance, its rights were not adequately considered, and certain questions concerning route selection were not adequately addressed by BLM, the BLM decision denying reconsideration will be vacated, the right-of-way grant set aside, and the case remanded.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

Departmental precedent and regulations establish that sec. 28 of the Mineral Leasing Act of 1920, as amended, provides the proper authority for issuance of pipeline rights-of-way for transportation of gas produced from Federal oil and gas leases. Where the pipeline is constructed off-lease, this is true regardless of whether the pipeline facility is characterized as a gathering line or production facility on the one hand or a pipeline for transportation of gas to market on the other hand. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent

RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 25, 1920--Continued

of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982), authorizing rights-of-way for "natural gas" pipelines provides the proper statutory authority for a right-of-way for a pipeline to transport all component gases produced from a well on Federal oil and gas leases, including a pipeline exclusively devoted to transportation of carbon dioxide subsequently separated from the other components of the gas stream emanating from the wellhead. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Exxon Corp., 97 IBLA 45 (Apr. 23, 1987) 94 I.D. 139

A BLM decision fixing the annual rental for a linear right-of-way issued pursuant to the Mineral Leasing Act, 30 U.S.C. § 185 (1982), in an amount equal to the orignal rental or last uncontested fee is properly affirmed where the right-of-way was originally issued in 1979 and its rental has become subject to adjustment pursuant to 43 CFR 2803.1-2(d). Said rental in the amount of the original rental or last uncontested fee is applicable, pursuant to Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204 (1984), during an interim period while BLM prepares new regulations establishing an approved method for appraising linear rights-of-way.

Northwest Central Pipeline Corp., 97 IBLA 327 (May 21, 1987)

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), all right, title, and interest to tentatively approved land was legislatively conveyed to the State of Alaska, effective from the date of tentative approval. BLM's decision not to include a reservation for the Alaska natural gas transportation system right-of-way grant in a patent to tentatively approved lands will be affirmed, where the right-of-way was

RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 25, 1920--Continued

granted Dec. 1, 1980, and the lands were tentatively approved Oct. 16, 1963. The applicant has no valid existing rights to such right-of-way through those lands under sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), since the right-of-way was not issued prior to the tentative approval.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

Where BLM determines, for the purpose of cost reimbursement, that under 43 CFR 2883.1-1(a)(3), an application for a temporary use permit for repair work on a right-of-way falls under Category IV, its decision will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Northwest Pipeline Corp., 99 IBLA 364 (Nov. 3, 1987)

APPLICATIONS

Although Federal oil and gas leasing is subject to extensive supervision by the Secretary of the Interior, and although the Secretary has broad discretion over whether or not to lease particular lands within the public domain, once he has granted a lease he may not derogate the rights acquired by the Federal lessee under the Mineral Leasing Act, 30 U.S.C. § 181 (1982), and the lease granted pursuant thereto.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761-1771 (1982), requires that a right-of-way application be approved prior to transporting water across public land for any mining purpose. Approval of a right-of-way application is within the discretion of the Secretary of the Interior. A decision by the Secretary's delegate, made in

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

exercise of such discretion, will be affirmed in the absence of sufficient reason to disturb it.

Desert Survivors, 96 IBLA 193 (Mar. 19, 1987)

Rejection of an application for a right-of-way for road access across Federal lands not under lease to a drill site on a Federal oil and gas lease may be reasonable where it is filed too close to the expiration date of the lease (after which the right-of-way would be meaningless) to allow processing consistent with the Department's statutory obligations under the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976. However, where an application for suspension of operations is filed prior to lease expiration to obtain time for approval of the right-of-way, rejection of the right-of-way application will be set aside as premature in the absence of an adjudication of the request for suspension.

John March, 98 IBLA 143 (June 22, 1987)

Under the regulations governing right-of-way applications, the authorized officer may require the applicant to submit additional information as he deems necessary. Also, the authorized officer is required to issue a deficiency notice when he finds the information supplied is incomplete or not in conformance with the law. However, the authorized officer is not required to request further information prior to issuance of a deficiency notice.

A right-of-way application for a wind farm is a request for a non-linear right-of-way, and, therefore, processing fee requirements are governed by 43 CFR 2803.1-1(a)(3)(ii). Where BLM requests submission of additional fees to cover processing costs for such a non-linear right-of-way, and the applicant fails to pay such fees, a BLM decision rejecting the application for failure to make additional payment will be upheld on appeal.

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

Where BLM determines, for the purpose of cost reimbursement, that under 43 CFR 2883.1-1(a)(3), an application for a temporary use permit for repair work on a right-of-way falls under Category IV, its decision will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Northwest Pipeline Corp., 99 IBLA 364 (Nov. 3, 1987)

BLM may condition approval of a right-of-way for an access road upon acceptance by the right-of-way applicant of stipulations imposing liability for any damage or injury incurred by the United States or third parties in connection with use of the right-of-way area by the applicant, where those stipulations reflect regulatory requirements which are binding on the Department.

Carl H. Alber, Jr., 100 IBLA 257 (Dec. 9, 1987)

APPRAISALS

The municipal holder of a right-of-way for a water treatment plant must pay fair market rental in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

A BLM decision fixing the annual rental for a linear right-of-way issued pursuant to the Mineral Leasing Act, 30 U.S.C. § 185 (1982), in an amount equal to the orignal rental or last uncontested fee is properly affirmed where the right-of-way was originally issued in 1979 and its rental has become subject to adjustment pursuant to 43 CFR 2803.1-2(d). Said rental in the amount of the original rental or last uncontested fee is applicable, pursuant to Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204 (1984), during an interim period while BLM prepares

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

new regulations establishing an approved method for appraising linear rights-of-way.

Northwest Central Pipeline Corp., 97 IBLA 327 (May 21, 1987)

An appraisal of a reservoir right-of-way granted pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be upheld on appeal if no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

Sec. 504(g) of the Federal Land Policy and Management Act of 1976 and 43 CFR 2803.1-2(c)(3), permit BLM to charge less than the fair market rental value if the right-of-way holder provides a valuable benefit to the public or to the programs of the Secretary without charge or at reduced rates.

Delbert Jones, 100 IBLA 289 (Dec. 16, 1987)

CANCELLATION

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

CONDITIONS AND LIMITATIONS

In regulations set forth at 25 CFR Part 169, the Secretary of the Interior has required tribal consent for any right-of-way across tribal land.

RIGHTS-OF-WAY--Continued

CONDITIONS AND LIMITATIONS--Continued

Under 25 CFR 169.19, prior written tribal consent is required for the renewal of a right-of-way across tribal lands.

Northern Natural Gas v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 124 (Mar. 2, 1987)

BLM may condition approval of a right-of-way for an access road upon acceptance by the right-of-way applicant of stipulations imposing liability for any damage or injury incurred by the United States or third parties in connection with use of the right-of-way area by the applicant, where those stipulations reflect regulatory requirements which are binding on the Department.

Carl H. Alber, Jr., 100 IBLA 257 (Dec. 9, 1987)

FEDERAL HIGHWAY ACT

In granting a right-of-way over public lands pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982) (formerly 23 U.S.C. § 18 (1946)), the Secretary of the Interior does not give up administrative authority over the lands subject to the right-of-way.

Kenneth L. Ingram et al., 96 IBLA 290 (Mar. 31, 1987)

Mining claims located on lands subject to a valid, ongoing, and pre-existing material-site right-of-way granted to the State of Nevada pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

Russell Avery & Douglas E. Noland, 99 IBLA 22 (Aug. 25, 1987)

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

The Alaska Native Claims Settlement Act requires the Secretary of the Interior to manage lands selected by a Native village corporation in accordance with applicable laws and regulations. The Secretary may issue rights-of-way over, upon, under, or through such land pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982).

BLM's decision granting a right-of-way for water treatment facilities will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason to disturb the decision is shown. Under 43 CFR 2650.1(a), the decision to issue such a right-of-way on land selected by a Native village corporation under the Alaska Native Claims Settlement Act must consider the views of the village; if the village does not consent to the right-of-way, the Department must balance the public interest against the interests of the village, issuing the right-of-way only if the public interest outweighs the objections of the village.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761-1771 (1982), requires that a right-of-way application be approved prior to transporting water across public land for any mining purpose. Approval of a right-of-way application is within the discretion of the Secretary of the Interior. A decision by the Secretary's delegate, made in exercise of such discretion, will be affirmed in the absence of sufficient reason to disturb it.

Desert Survivors, 96 IBLA 193 (Mar. 19, 1987)

Where a right-of-way applicant was charged $375 for 5-years use of a linear road right-of-way, contrary to provision of a Bureau of Land Management Instruction Memorandum requiring that new linear rights-of-way should be charged a minimum rental of $25 for 5 years pending final approval of regulations implementing a

uniform system of appraisal for such rights-of-way, the decision establishing the $375 rate must be vacated.

Where there is an indication in the case file that a road for which an application for a right-of-way has been made may be an existing public highway, a decision establishing a rental charge for use of the right-of-way is vacated and the case file remanded for further fact-finding to determine whether the road right-of-way is properly subject to any rental charge.

Dean R. Karlberg, 98 IBLA 237 (July 6, 1987)

A telephone microwave repeater station financed pursuant to the Rural Electrification Act, 7 U.S.C. § 901 (1982), is a facility for which a right-of-way shall be granted without rental fees, as provided by the Act of May 25, 1984, P.L. 98-300, 98 Stat. 215, amending 43 U.S.C. § 1764(g) (Supp. III 1985).

South Central Utah Telephone Ass'n, Inc., 98 IBLA 275 (July 17, 1987)

If a rental charge required by 43 CFR 2803.1-2 is not paid when due, and such default continues for 30 days after notice, BLM may take action to terminate a right-of-way grant issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982). When the holder of a right-of-way grant has not paid rent for over 2 years, BLM may properly terminate the right-of-way grant.

Aztec Energy Corp., 98 IBLA 372 (Aug. 3, 1987)

NATURE OF INTEREST GRANTED

A right-of-way for an electric transmission line issued, subject to valid existing rights, pursuant to the Act of Mar. 4, 1911, over lands in the open and notorious possession of an Alaska Native cannot diminish the statutory preference right to a Native allotment. Although the preference right is inchoate prior to completion of the required period of qualifying use and occupancy and the filing of a timely application, when the preference right is vested it

takes precedence over intervening applications filed subsequent to the commencement of use and occupancy by the Native and the right-of-way will be ineffective to authorize use of lands in the allotment after vesting of the preference right.

Golden Valley Electric Ass'n (On Reconsideration), 98 IBLA 203 (June 29, 1987)

OIL AND GAS PIPELINES

Although Federal oil and gas leasing is subject to extensive supervision by the Secretary of the Interior, and although the Secretary has broad discretion over whether or not to lease particular lands within the public domain, once he has granted a lease he may not derogate the rights acquired by the Federal lessee under the Mineral Leasing Act, 30 U.S.C. § 181 (1982), and the lease granted pursuant thereto.

Where, following issuance of a right-of-way grant for a crude oil pipeline across lands embraced by a Federal oil and gas lease, the lessee requests reconsideration of that grant complaining that the grant will interfere with present and future operations on its lease, and the record indicates the lessee was not provided notice prior to right-of-way issuance, its rights were not adequately considered, and certain questions concerning route selection were not adequately addressed by BLM, the BLM decision denying reconsideration will be vacated, the right-of-way grant set aside, and the case remanded.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

Departmental precedent and regulations establish that sec. 28 of the Mineral Leasing Act of 1920, as amended, provides the proper authority for issuance of pipeline rights-of-way for transportation of gas produced from Federal oil and gas leases. Where the pipeline is constructed off-lease, this is true regardless of whether the pipeline facility is characterized as a gathering line or production facility on the one hand or a pipeline for transportation of gas to market on the other hand. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil

RIGHTS-OF-WAY--Continued

OIL AND GAS PIPELINES--Continued

and gas lessees to develop their leases and market the products of lease development.

Sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982), authorizing rights-of-way for "natural gas" pipelines provides the proper statutory authority for a right-of-way for a pipeline to transport all component gases produced from a well on Federal oil and gas leases, including a pipeline exclusively devoted to transportation of carbon dioxide subsequently separated from the other components of the gas stream emanating from the wellhead. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Exxon Corp., 97 IBLA 45 (Apr. 23, 1987) 94 I.D. 139

RULES OF PRACTICE
(See also Administrative Procedure, Appeals, Contests & Protests, Contracts, Hearings, Indian Probate, Practice Before the Department--if included in this Index.)

GENERALLY

In the normal course of review, the Board considers both the legal issues raised by appellants and the specific factual determinations on which the agency's decision was based. Absent a record supporting the agency's factual determinations, the Board cannot sustain a finding applying the relevant law.

Conoco Inc., et al., 96 IBLA 384 (Apr. 14, 1987)

The assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" does not apply to claims which did not exist at the time of publication of notice of a patent application and for which no adverse claim could have been filed.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), operates as a presumption that the patent applicant holds superior possessory title so that the Department may proceed

RULES OF PRACTICE--Continued

GENERALLY--Continued

to determine the question of whether his mining claim is valid under the mining laws. If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. If the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for land or apply for a patent himself.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

APPEALS

Generally

When subsequent to execution of a mineral material sales contract, the Department has amended the regulation providing for automatic termination of such a contract for failure to submit an in lieu of minimum annual production payment on or before the anniversary date by giving the authorized officer discretionary authority to terminate, the Board will set aside a BLM decision holding the contract to have automatically terminated and remand the case to BLM to allow the exercise of its discretion.

T. Brown Constructors, Inc., 95 IBLA 107 (Jan. 6, 1987)

When a range-line agreement between two licensees provides a division of the range will stand until such time as a range study is conducted, and the range study indicates the allotments do not fairly represent the proportion of range lands each party is entitled to on a demand-forage basis, an Administrative Law Judge's decision finding that one of the licensees may be entitled to an adjustment of grazing privileges and remanding the case to BLM to effect an equalization will be affirmed upon appeal.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

When, on appeal, a Native allotment applicant is challenging a survey of the land described in an allotment application claiming it is not the land he intended to apply for, and evidence is submitted indicating the applicant may have executed and submitted a later application prior to repeal of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), the case will be referred for a hearing before an administrative law judge who will determine whether the later application was an amended application pending before the Department on or before Dec. 18, 1971.

Stephen Northway, 96 IBLA 301 (Apr. 2, 1987)

Where, in computing the acreage of a parcel of land for purposes of arriving at its fair market value in a conveyance to a color-of-title applicant, BLM relied on planimetric measurements of the parcel as depicted on older survey plats and field notes and there is evidence the acreage may subsequently have changed through erosion or accretion, the Board will remand the case to BLM for a resurvey to determine the acreage actually existing in the tract on the date of appraisal.

Weathersby Godbold Carter, Richard T. Harriss, III, 97 IBLA 108 (Apr. 29, 1987)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

Where a determination of Native group eligibility has been made by the Bureau of Indian Affairs pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the doctrine of administrative finality operates to bar the eligibility issue from consideration in an appeal from a decision approving lands for patent pursuant to sec. 14(h)(2) of the Act, 43 U.S.C. § 1613(h)(2) (1982).

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

Where an appeal to the Board constitutes, in essence, a request for an advisory opinion, the appeal will be dismissed.

Tennessee Consolidated Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 274 (Oct. 20, 1987)

Burden of Proof

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

Dismissal

A motion to dismiss an appeal on the grounds that the appellant failed to file a timely notice of appeal under 43 CFR 4.411(a) will be denied when the notice of appeal, although incorrectly styled a "protest," was filed in the office of the officer who made the

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

decision within 30 days of service of the decision sought to be reviewed.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

The jurisdiction of the Board of Land Appeals extends to appeals from decisions of Departmental officials regarding the disposition of minerals on public domain and acquired lands pursuant to statutory authority and the regulations promulgated thereunder. As a general rule, this Board has no authority to entertain a claim under the common law of contracts for damages for contract breach and an appeal to this Board predicated on such a ground is properly dismissed for lack of jurisdiction.

Exxon Corp., 95 IBLA 374 (Feb. 18, 1987)

Where a notice of appeal is not filed within 30 days after the person filing the notice has been served with a decision, the Board does not have jurisdiction to review that decision.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

An appeal supported by a statement of reasons which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered on its own merits.

Mullins Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 333 (Apr. 7, 1987)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

Under 43 CFR 4.411(a), a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The filing of a notice of appeal in a timely manner is jurisdictional, and failure to file an appeal within the time allowed will result in dismissal of the appeal. 43 CFR 4.401(a) provides a delay in filing may be waived if the document is filed no later than 10 days after the deadline, and the document was transmitted on or before the deadline date. When a notice of appeal was due on or before Nov. 27, 1985, and the postmark on the envelope shows that it was transmitted Nov. 29, 1985, the delay in filing may not be waived.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

Under 43 CFR 4.1282(b), notice of appeal must be filed on or before 20 days from the date of receipt of the order or decision sought to be reviewed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

If an appellant fails to tender the first year's rental and filing fee when appealing from a decision that a simultaneous oil and gas lease application is unacceptable, the appeal will be dismissed for failure to comply with 43 CFR 3112.3(h). If, however, the first year's rental and filing fee have previously been tendered, and have not been refunded at the time of filing a notice of appeal, the previous submittal will suffice.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 4.411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

Effect of

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect of--Continued

within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)
94 I.D. 132

When a Bureau of Land Management decision has been properly appealed to the Board of Land Appeals by an adversely affected party, the Bureau loses jurisdiction over the case and has no authority to take further dispositive action on the subject matter of the appeal. Should the Bureau desire to take such action, it may request that the Board take the action or ask the Board to restore the Bureau's jurisdiction by remanding the case for it to take the action.

Melvin N. Barry, Frank Simpson, 97 IBLA 359 (May 26, 1987)

Where an individual files an "appeal" with BLM of a notice of a proposed direct sale of certain public lands, that filing is not an appeal under 43 CFR 4.410; rather it is a protest, which, under 43 CFR 4.450-2, is any objection to any action proposed to be taken by BLM.

An "appeal" of action proposed to be taken by BLM is a protest, and where that protest contains absolutely no reason for objection to the proposed action, BLM may summarily dismiss the protest. Where the protest is subsequently forwarded to the Board for review as an appeal, the "appeal" will be dismissed because to treat the protest as an appeal and to allow a protestant to present his objections to the proposed action for the first time on appeal would put the Board

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect of--Continued

in the position of being the initial decisionmaker and would frustrate the Departmental framework for decisionmaking.

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

Pursuant to 43 CFR 3165.4 (1986), decisions of BLM officials implementing the onshore oil and gas operating regulations at 43 CFR Subpart 3160 are an exception to the general rule set forth at 43 CFR 4.21(a), and are not automatically stayed pending appeal. Once an appeal to the Board has been filed, requests for suspension are properly filed with the Board of Land Appeals.

Southern Utah Wilderness Alliance, 100 IBLA 63 (Nov. 30, 1987)

Hearings

BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands for a violation of any term or condition of the instrument only after notice and an opportunity for a hearing, unless BLM determines that an immediate temporary suspension is necessary to protect health or safety or the environment, or that other applicable law contains specific provisions for suspension, revocation, or cancellation of a particular land-use authorization.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)
94 I.D. 132

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a

RULES OF PRACTICE--Continued

APPEALS--Continued

Hearings--Continued

relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

The Board will not order a further hearing in a mining claim contest where the claimant failed to appear at or participate in the original hearing and, on appeal from a decision declaring his claim null and void for lack of a discovery of a valuable mineral deposit, he has made unsupported allegations but has provided no evidence that a further hearing would produce a different result.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

Motions

A Government's Motion for Summary Judgment is denied where the Board finds that determining a fair and reasonable profit under a contract terminated for the convenience of the Government involves the exercise of judgment by the contracting officer whose determinations are subject to de novo review by the Board which

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

may sustain, modify, or overturn the decision reached by the contracting officer.

Appeal of Quality Seeding, Inc., IBCA-2297 (July 21, 1987) 94 I.D. 368

Notice of Appeal

It does not matter whether a document filed with the Bureau of Land Management characterizes itself as a request for reconsideration or an appeal. Even though an individual may not characterize the document as an appeal, if the submission challenges the findings of fact or conclusions made by an adverse decision, it must be treated as a notice of appeal.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

If an appellant fails to tender the first year's rental and filing fee when appealing from a decision that a simultaneous oil and gas lease application is unacceptable, the appeal will be dismissed for failure to comply with 43 CFR 3112.3(h). If, however, the first year's rental and filing fee have previously been tendered, and have not been refunded at the time of filing a notice of appeal, the previous submittal will suffice.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

Reconsideration

A petition for reconsideration based on arguments already considered by the Board of Indian Appeals in its initial decision does not demonstrate extraordinary circumstances warranting reconsideration under 43 CFR 4.315.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 271 (Aug. 19, 1987)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal

The jurisdiction of the Board of Land Appeals extends to appeals from decisions of Departmental officials regarding the disposition of minerals on public domain and acquired lands pursuant to statutory authority and the regulations promulgated thereunder. As a general rule, this Board has no authority to entertain a claim under the common law of contracts for damages for contract breach and an appeal to this Board predicated on such a ground is properly dismissed for lack of jurisdiction.

Exxon Corp., 95 IBLA 374 (Feb. 18, 1987)

One who is a mere trespasser upon land without claim or color of right does not possess the legally cognizable interest necessary for standing to appeal from a decision granting a conflicting Native allotment application.

James M. Wright, Butch L. Loper, 95 IBLA 387 (Feb. 24, 1987)

Regulation 43 CFR 4.410, setting forth the standard regarding who may appeal to the Board of Land Appeals, contains two separate and discrete prerequisites: (1) that appellant be a party to the case, and (2) that appellant be adversely affected by the decision on appeal. An appeal by a stockholder of a corporation is properly dismissed for lack of standing where the issue raised by appellant is the ownership of the corporation and the decision does not purport to adjudicate that issue.

Greg Williams, 98 IBLA 303 (July 29, 1987)

A party has standing to appeal a Department decision relating to land selections under the Alaska Native Claims Settlement Act, as amended, if the party claims a property interest in land affected by the

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

decision, such as the right to use an existing right-of-way pursuant to a right-of-way use agreement.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

Under 43 CFR 4.410(a), there are two separate and distinct prerequisites to prosecution of an appeal to the Board of Land Appeals: (1) the appellant must be a "party to the case," and (2) the appellant must be "adversely affected" by the decision below.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), does not extend to preclude a mining claim for which no adverse claim was filed during publication of notice of patent proceedings from serving as a foundation for finding standing to appeal.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

Statement of Reasons

An appeal supported by a statement of reasons which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered on its own merits.

Mullins Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 333 (Apr. 7, 1987)

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)
94 I.D. 132

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing

A motion to dismiss an appeal on the grounds that the appellant failed to file a timely notice of appeal under 43 CFR 4.411(a) will be denied when the notice of appeal, although incorrectly styled a "protest," was filed in the office of the officer who made the decision within 30 days of service of the decision sought to be reviewed.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)
94 I.D. 132

Under 43 CFR 4.411(a), a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The filing of a notice of appeal in a timely manner is jurisdictional, and failure to file an appeal within the time allowed will result in dismissal of the appeal. 43 CFR 4.401(a) provides a delay in filing may be waived if the document is filed no later than 10 days after the deadline, and the document was transmitted on or before the deadline date. When a notice of appeal was due on or before Nov. 27, 1985, and the postmark on the envelope shows that it was transmitted Nov. 29, 1985, the delay in filing may not be waived.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

Under 43 CFR 4.1282(b), notice of appeal must be filed on or before 20 days from the date of receipt of the order or decision sought to be reviewed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to the Board of Land Appeals.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 4.411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

EVIDENCE

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, affidavits that copies of signed oil and gas lease offers were timely filed with the proper BLM office must ordinarily be corroborated by

RULES OF PRACTICE--Continued

EVIDENCE--Continued

other evidence to establish filing where there is no evidence of receipt of the documents in the file.

David A. Gitlitz, 95 IBLA 221 (Jan. 15, 1987)

The presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

GOVERNMENT CONTESTS

BLM may properly dismiss, with prejudice, a patent application with respect to association oil shale placer mining claims where such claims were properly declared null and void in earlier Government contest proceedings when the applicant's predecessors-in-interest failed to timely file answers to successive complaints, which together resulted in service by registered mail upon all of the co-owners of the claims. It was not necessary that the interests of all of the contestees be declared null and void in a single proceeding.

The owner of an oil shale placer mining claim will be regarded as having been properly served with notice of a Government contest complaint when that person actually received a copy of the complaint challenging the validity of the claim, even though there was a minor error in the name of the contestee on the complaint and a copy of the complaint was not sent to the post office nearest the claim, in accordance with the applicable rules, paragraph 6 of Circular No. 460, 44 L.D. 573 (1916).

Assuming the applicability of rule 8 of the Rules of Practice (51 L.D. 549 (1926)) to Government contests, such a contest challenging the validity of an oil shale placer mining claim will not be held to have abated pursuant to that rule where the Government failed to serve one of the co-owners of the claim named

RULES OF PRACTICE--Continued

GOVERNMENT CONTESTS--Continued

in the contest complaint. At best, the contest will be deemed to have abated only as to the unserved contestee.

Union Oil Co. of California, 98 IBLA 37 (June 3, 1987)

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

HEARINGS

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

RULES OF PRACTICE--Continued

HEARINGS--Continued

A hearing is not necessary in the absence of allegations of a material issue of fact, which, if proven, would alter the disposition of the appeal.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

Where the record presents unresolved questions of fact as to whether there are adequate reasons supporting BLM's departure from the usual method of apportioning accreted lands, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions.

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

PRIVATE CONTESTS

Although BLM may properly declare mining claims abandoned on the basis of a state court decision on the rights of rival claimants to possession, it should not do so until the state appellate court review process is complete.

Alvin L. Kile, Leslie L. Maxwell, 97 IBLA 6 (Apr. 17, 1987)

PROTESTS

In adjudicating a 1984 protest against a 1939 cancellation of a homestead entry, BLM properly dismissed the protest. A protest properly is an objection to a proposed action, and may not be used to challenge an action which has been completed.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

RULES OF PRACTICE--Continued

PROTESTS--Continued

A State protest of a Native allotment application filed pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1982), will be considered sufficient to require the adjudication of the application pursuant to the Act of May 17, 1906, as amended, where it identifies in part, with some particularity, a public interest in access to public lands, resources, or bodies of water which could be jeopardized by confirmation of the allotment application.

State of Alaska, 95 IBLA 196 (Jan. 14, 1987)

A State protest against approval of a Native allotment application fails to state with sufficient specificity the facts upon which conclusions concerning public access are made so as to conform to provision of 43 U.S.C. § 1634(a)(5)(B) (1982), where the protest recites that the applied-for land is the site of an existing seaplane base, boat launch, and trail, when it appears none of the claimed improvements are located on the allotment. Since the State's protest does not describe the land claimed by the Native allotment applicant with specificity under such a circumstance, the allotment may be granted to the Native applicant, all else being regular.

There is no authority for the reservation of easements in Native allotments comparable to sec. 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1982), governing reservations of easements in conveyances to Native corporations. An easement across Native corporation lands recognized pursuant to ANCSA may not constitute sufficient grounds for protest of a Native allotment under sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), where the record discloses the route of access reserved in the easement does not cross or abut the Native allotment parcel.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (Feb. 4, 1987)

RULES OF PRACTICE--Continued

PROTESTS--Continued

A decision approving a bond filed by a mineral claimant of reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed when the owner of the surface estate failed to file objections to issuance of the bond pursuant to 43 CFR 3814.1(d), notwithstanding the fact that the surface owner has filed a civil complaint against the mineral claimant and intends to initiate a private contest against the mineral claimant.

Visintainer Sheep Co., 97 IBLA 63 (Apr. 27, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

A protest of a BLM declaration that a party is the successful high bidder at a timber sale is not a protest of a timber management decision governed by 43 CFR 5003.3, as the protesting party has no way of knowing who may bid at the sale or who will submit the high bid at the time a decision to conduct a sale is published. The regulations applicable to such protests are those found at 43 CFR 4.450-2.

Internat'l Paper Co., 98 IBLA 52 (June 5, 1987)

Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to the Board of Land Appeals.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

RULES OF PRACTICE--Continued

PROTESTS--Continued

Where an individual files an "appeal" with BLM of a notice of a proposed direct sale of certain public lands, that filing is not an appeal under 43 CFR 4.410; rather it is a protest, which, under 43 CFR 4.450-2, is any objection to any action proposed to be taken by BLM.

An "appeal" of action proposed to be taken by BLM is a protest, and where that protest contains absolutely no reason for objection to the proposed action, BLM may summarily dismiss the protest. Where the protest is subsequently forwarded to the Board for review as an appeal, the "appeal" will be dismissed because to treat the protest as an appeal and to allow a protestant to present his objections to the proposed action for the first time on appeal would put the Board in the position of being the initial decisionmaker and would frustrate the Departmental framework for decisionmaking.

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

A locator who fails to file an adverse claim against an application for patent may file a protest on the grounds that the applicant has failed to comply with the mining laws.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

WITNESSES

In denying a request by appellant that the testimony of a project engineer on a Government project for the construction of a dam be disregarded as in conflict with an entry in the project diary made by an inspector, the Board noted that there appeared to be a reasonable basis for reconciling the purportedly conflicting evidence but that in any event there was an obligation to confront the project engineer with the diary entry at the hearing, if, after the record was closed, appellant was to rely upon the diary entry to discredit the testimony given by the project engineer.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

SCHOOL LANDS
(See also State Selections--if included in this Index.)

GRANTS OF LAND

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

INDEMNITY SELECTIONS

A mining claim located on land which had been subject to the final approval of a list of state-selected land is properly declared null and void ab initio.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

SECRETARY OF THE INTERIOR
(See also Administrative Authority--if included in this Index.)

Although Federal oil and gas leasing is subject to extensive supervision by the Secretary of the Interior, and although the Secretary has broad discretion over whether or not to lease particular lands within the public domain, once he has granted a lease he may not derogate the rights acquired by the Federal lessee under the Mineral Leasing Act, 30 U.S.C. § 181 (1982), and the lease granted pursuant thereto.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

SECRETARY OF THE INTERIOR--Continued

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

The Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

Although neither sec. 4 of the General Allotment Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982), nor the Indian allotment regulations at 43 CFR Part 2530, specifically provide for the cancellation of a certificate of allotment, the Secretary of the Interior, as custodian of the public lands, may cancel such a certificate where he finds that the allottee has not complied with the requirements for issuance of a patent.

James Leland Wallace, 100 IBLA 70 (Nov. 30, 1987)

SEGREGATION

A selection application filed under the Alaska Statehood Act for land properly described in the appropriate Bureau of Land Management office segregates the land from all appropriation based upon subsequent application or settlement and location.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

SEGREGATION--Continued

"Notation rule." Where an Alaska Native corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face in that the land selected is not legally subject to such selection under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

BLM properly rejects an application for an Indian allotment filed pursuant to sec. 4 of the Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982), where, at the time the application was filed, the land was segregated, in accordance with 43 CFR 2711.1-2(d), from appropriation under the public land laws by publication in the Federal Register of notice of realty action offering the land for sale.

Frank F. Salsedo, 99 IBLA 170 (Oct. 2, 1987)

A mineral patent application does not segregate land from the acquisition of competing rights.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

SETTLEMENTS ON PUBLIC LANDS

Under regulation 43 CFR 2091.5, authorized officers will determine by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made

SETTLEMENTS ON PUBLIC LANDS--Continued

by persons other than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

An Indian seeking an Indian allotment in Alaska under the Act of Feb. 8, 1887, has not established settlement under the Act or demonstrated sufficient use and possession to prevent the segregative effect of a grazing lease from attaching by settlement efforts consisting of brief visits to the vicinity of the allotment lands, one extended 30-day stay in the vicinity of the allotment lands, and insubstantial improvements on the land.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

SMALL TRACT ACT

APPRAISALS

A decision imposing fair market rental for a small tract lease will be affirmed where the appraisal determining the fair market rental value is conducted following established criteria, and the lessee fails to show error in the appraisal methods or present convincing evidence that the charges are excessive.

Lawrence Dupuis, 99 IBLA 174 (Oct. 2, 1987)

RENEWAL OF LEASE

A decision imposing fair market rental for a small tract lease will be affirmed where the appraisal determining the fair market rental value is conducted following established criteria, and the lessee fails to show error in the appraisal methods or present convincing evidence that the charges are excessive.

Lawrence Dupuis, 99 IBLA 174 (Oct. 2, 1987)

SPECIAL USE PERMITS

A special use permit is subject to any special condition or stipulation deemed necessary for protection of public interests, including minimum-use requirements. Where BLM notifies a permittee that its permit will be subject to cancellation unless certain described use is made in accordance with a permit stipulation, and the permittee fails to make that required use, the permit is properly cancelled. Allegations of discriminatory treatment which are not supported by the case record will not serve as a basis to overturn BLM's action.

Peak River Expeditions (On Reconsideration), 98 IBLA 13 (May 29, 1987)

BLM may properly cause the holder of a special recreation permit for commercial use of a wild and scenic river to forfeit two scheduled trips where the evidence establishes that, in the preceding year's regulated use period, the permittee launched a scheduled trip without checking in at the necessary location on the day of the launch, as required by stipulations incorporated in the permit.

BLM may properly place the holder of a special recreation permit for commercial use of a wild and scenic river on a probationary status where the evidence establishes that the permittee gave his trip card to someone other than a bona fide employee, who then conducted the scheduled trip, thereby effecting a partial assignment of his permit in violation of the stipulations incorporated in his permit.

Robert L. Snook d.b.a. Beaver State Adventures, 100 IBLA 151 (Dec. 3, 1987)

STATE COURTS

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching

STATE COURTS--Continued

its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

STATE GRANTS

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

STATE LANDS

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the

STATE LANDS--Continued

section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

STATE SELECTIONS
(See also School Lands, Swamplands--if included in this Index.)

A selection application filed under the Alaska Statehood Act for land properly described in the appropriate Bureau of Land Management office segregates the land from all appropriation based upon subsequent application or settlement and location.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

Under sec. 6(g) of the Alaska Statehood Act, 72 Stat. 340, the Secretary of the Interior is required, when revoking an existing withdrawal of public land in Alaska, to provide a 90-day period during which time the State of Alaska is afforded a preference right to select the land. Where a public land order revokes a prior withdrawal so as to make the land available for selection by the State, the land may not be simultaneously opened for the location of mining claims for metalliferous minerals, and a public land order purportedly opening such land to mineral location is only effective after the passage

STATE SELECTIONS--Continued

of the 90-day period mandated by the Alaska Statehood Act.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

A mining claim located on land which had been subject to the final approval of a list of state-selected land is properly declared null and void ab initio.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

STATUTES

The Secretary is authorized to convey lands out of a wildlife refuge pursuant to sec. 14(h)(7) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(h)(7) (1982). This authority has not been rescinded by amendments to the National Wildlife Refuge System Administration Act or by the Alaska National Interest Lands Conservation Act.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

STATUTES--Continued

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

The assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" does not apply to claims which did not exist at the time of publication of notice of a patent application and for which no adverse claim could have been filed.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), operates as a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim is valid under the mining laws. If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. If the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for land or apply for a patent himself.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

STATUTORY CONSTRUCTION

GENERALLY

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

INDIANS

Federal statutes concerning rights-of-way over tribal lands, and concerning tribal lands generally, evidence congressional intent to vest Indian tribes with power to control the use of their own lands.

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

Where 25 CFR 169.20 provides for the termination of a right-of-way for nonuse for a consecutive 2-year period for the purpose for which the right-of-way was granted, no provision of statute, regulation, or the right-of-way documents authorized the Bureau of Indian Affairs to excuse involuntary nonuse without the consent of the tribe.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

STOCK-RAISING HOMESTEADS

(See also Homesteads (Ordinary)--if included in this Index.)

Removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

A decision approving a bond filed by a mineral claimant of reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed when the owner of the surface estate failed to file objections to issuance of the bond pursuant to 43 CFR 3814.1(d), notwithstanding the fact that the surface owner has filed a civil complaint against the mineral claimant and intends to initiate a private contest against the mineral claimant.

Visintainer Sheep Co., 97 IBLA 63 (Apr. 27, 1987)

The unauthorized removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass against the United States. The fact that the United States could not presently dispose of the deposit does not affect either the right of the United States to recover damages for the trespass nor the valuation of the deposit so removed.

The right of a surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), for damages to the surface occasioned by the removal of minerals reserved under that Act is limited to the value of crops, permanent improvements, and damages to the land for grazing purposes.

In determining the amount of damages due to the United States for the unauthorized removal of reserved mineral deposits by the surface owner, it is necessary to first ascertain the in-place value of the mineral deposit and then subtract from this figure the amount

STOCK-RAISING HOMESTEADS--Continued

of surface damages compensable under 43 U.S.C. § 299 (1970) and 30 U.S.C. § 54 (1982).

United States v. Browne-Tankersley Trust, 98 IBLA 325 (July 31, 1987)

SUBMERGED LANDS

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

ABATEMENT

Generally

Where a 10-day notice to the State regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSM may issue a notice of violation in accordance with 30 CFR 843.12(a), if the State fails to take "appropriate action" to abate the violation. A notice of violation issued by OSM will be upheld where it appears that the notices of violation issued by the State in response to the 10-day notice were either vacated by the State, prior to abatement of the conditions giving rise to the violation, or the period for abatement was extended beyond the 90-day limitation imposed by State law.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 204 (Jan. 14, 1987) 94 I.D. 12

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

ABATEMENT--Continued

Generally--Continued

A cessation order is properly issued by OSMRE when the permittee fails to abate a notice of violation which calls for submitting, after construction, certification by a registered professional engineer that a sedimentation pond has been built in accordance with the approved design, even though the pond had been constructed.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

The Board of Land Appeals need not decide whether a permittee could retroactively take advantage of an amended regulation allowing for extensions of the abatement period where there is no evidence in the record which would show affirmatively the permittee's entitlement to such an extension, even if it were available.

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

Where a 10-day notice to the State regulatory authority is issued in response to a citizen's complaint, OSMRE may conduct a Federal inspection and issue appropriate enforcement orders if the State fails to take "appropriate action" to abate a violation within 10 days. Where, however, the evidence establishes that the State action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 87 (Sept. 15, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ABATEMENT--Continued

Generally--Continued

OSMRE may properly issue a notice of violation when, following a 10-day notice to the State regulatory authority, the State declines to correct a revegetation violation on the basis that it lacks jurisdiction to act following bond release.

Dora Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 300 (Dec. 23, 1987)

Remedial Actions

When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly issue a notice of violation requiring remedial action of a reclamation nature.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

A permittee will be deemed to have abated a violation of 30 CFR 715.14(i) for failure to regrade and stabilize rills and gullies on the permit area deeper than 9 inches where the notice of violation was modified by agreement of the parties at a hearing to require stabilization by placing straw bales at strategic locations and the evidence establishes that the permittee has stabilized the rills and gullies.

A permittee will be deemed to have abated a violation of 30 CFR 715.17(a) for failure to pass all drainage from the disturbed area through a sedimentation pond before leaving the permit area where the notice of violation was modified by agreement of the parties at a hearing to require construction of a sedimentation ditch using straw bales and the evidence establishes that the permittee constructed a berm and filter barrier which was the functional equivalent of the agreed-upon structure.

Palmer Coking Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 266 (Mar. 26, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE

Generally

When the Office of Surface Mining Reclamation and Enforcement issues a 10-day notice to a state pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), based upon a citizen's complaint which alleges irregularities in the issuance of surface mining permits, and the state responds by demonstrating that the operator and the state complied with relevant provisions of the state's surface mining statute, the Board will affirm the decision of the Acting Director, Office of Surface Mining Reclamation and Enforcement, that the response to the citizen's complaint was appropriate.

Samuel M. Mullinax, 96 IBLA 52 (Feb. 27, 1987)

The Board will reverse an order of an administrative law judge dismissing an application for review of a notice of violation for failure to respond timely to a show cause order which concluded that the application had failed to allege facts entitling the applicant to administrative relief, in compliance with 43 CFR 4.1164, where the application was sufficient in that respect. The case will be remanded for further administrative proceedings.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 78 (Apr. 28, 1987)

Burden of Proof

In a hearing on an application for review of a notice of violation or cessation order, OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is unrebutted, the violation will be sustained on appeal.

Mullins Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 333 (Apr. 7, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

In a civil penalty proceeding OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. If that showing goes unrebutted, it will sustain the violation.

A&S Coal Co. Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 338 (Apr. 7, 1987)

Scope of Review

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if the permittee failed to timely seek review of the notice of violation.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

APPEALS

Generally

The Board will reverse an order of an administrative law judge dismissing an application for review of a notice of violation for failure to respond timely to a show cause order which concluded that the application had failed to allege facts entitling the applicant to administrative relief, in compliance with 43 CFR 4.1164, where the application was sufficient in that respect. The case will be remanded for further administrative proceedings.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 78 (Apr. 28, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPEALS--Continued

Generally--Continued

Under 43 CFR 4.1282(b), notice of appeal must be filed on or before 20 days from the date of receipt of the order or decision sought to be reviewed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

Where an appeal to the Board constitutes, in essence, a request for an advisory opinion, the appeal will be dismissed.

Tennessee Consolidated Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 274 (Oct. 20, 1987)

APPROXIMATE ORIGINAL CONTOUR

Generally

Access roads or terraces created during mining operations must be backfilled and graded so that the reclaimed area closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls and spoil piles eliminated. Where an access road or terrace not described in a mining plan is constructed, and a NOV is issued as a result thereof calling for backfilling and regrading as the means for abatement, OSM may properly refuse acceptance of a subsequently submitted mining plan designating the disturbed area as a road necessary for postmining land use.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

AREAS UNSUITABLE FOR SURFACE COAL MINING

Generally

Where OSM has not acted in an arbitrary and capricious fashion, a decision under 30 CFR 764.15(a)(7) not to consider an unsuitability petition filed pursuant to sec. 522(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(c) (1982), to the extent it involves land which is subject to a Federal Coal Mining and Reclamation permit application which was filed, and the first newspaper notice thereof published, prior to the filing of the petition, will be affirmed.

Donald B. Peterson, 97 IBLA 314 (May 19, 1987)

Under sec. 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977, 43 U.S.C. § 1272(e)(1) (1982), after Aug. 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which existed on Aug. 3, 1977, shall be permitted on any lands within the boundaries of units of the National Park System. If the owner of coal underlying National Park System lands admits that there was no surface coal mining operations prior to Aug. 3, 1977, on the tract in question, and that an application for a permit to conduct such operations had not been filed prior to that date, the coal owner is prohibited from conducting surface coal mining operations within the boundaries of a unit of the National Park System.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

Areas Designated by Congress

Under sec. 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977, 43 U.S.C. § 1272(e)(1) (1982), after Aug. 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which existed on Aug. 3, 1977, shall be permitted on any lands within the boundaries of units of the National Park System. If the owner of coal underlying National Park System lands admits that there was no surface coal mining operations prior to Aug. 3, 1977, on the tract in question, and that an application for a permit to conduct such operations had not been filed prior to that date, the coal owner is prohibited

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

AREAS UNSUITABLE FOR SURFACE COAL MINING--Continued

Areas Designated by Congress--Continued

from conducting surface coal mining operations within the boundaries of a unit of the National Park System.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

BACKFILLING AND GRADING REQUIREMENTS

Generally

Access roads or terraces created during mining operations must be backfilled and graded so that the reclaimed area closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls and spoil piles eliminated. Where an access road or terrace not described in a mining plan is constructed, and a NOV is issued as a result thereof calling for backfilling and regrading as the means for abatement, OSM may properly refuse acceptance of a subsequently submitted mining plan designating the disturbed area as a road necessary for postmining land use.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

A permittee will be deemed to have abated a violation of 30 CFR 715.14(i) for failure to regrade and stabilize rills and gullies on the permit area deeper than 9 inches where the notice of violation was modified by agreement of the parties at a hearing to require stabilization by placing straw bales at strategic locations and the evidence establishes that the permittee has stabilized the rills and gullies.

Palmer Coking Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 266 (Mar. 26, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

BACKFILLING AND GRADING REQUIREMENTS--Continued

Generally--Continued

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to obtain prior approval for the construction of small depressions where there is no proof that the permittee, whether by design or otherwise, actually constructed the depressions.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

BLASTING AND USE OF EXPLOSIVES

Generally

A decision by the Director, Office of Surface Mining Reclamation and Enforcement, or his delegate, in response to a citizen's complaint alleging that damage to a dwelling has been caused by blasting operations conducted by a surface coal mining operation, declining to take enforcement action pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271 (1982), is subject to appeal to the Board of Land Appeals. Where such a decision is based on a finding after inspection that the damage was not caused by blasting operations, the decision may be set aside and the case referred to an evidentiary hearing before an administrative law judge pursuant to 43 CFR 4.1286 where the issue of whether the blasting is a causative factor in the damage is a material issue of fact dispositive of the appeal.

Clifford Mackey et al., 99 IBLA 285 (Oct. 23, 1987)

BONDS

Generally

Where the record is unclear whether the surety of a performance bond was served by certified mail with OSMRE's notice of determination to forfeit the bond and the surety on appeal expresses its intention to reclaim the permit area, OSMRE should properly re-serve its

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

BONDS--Continued

Generally--Continued

notice of determination in accordance with 30 CFR 800.50.

American Resources Insurance Co., Inc., 99 IBLA 242 (Oct. 20, 1987)

Release of

Release of a surface mining reclamation performance bond by a state does not reduce or affect the authority of the Office of Surface Mining Reclamation and Enforcement to regulate the miner. The fact of release of a performance bond is not relevant to the determination whether reclamation has properly been performed.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

CESSATION ORDERS

Generally

If, upon reinspection after a State has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS--Continued

Generally--Continued

to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

When OSM issues a notice of violation and a cessation order during the initial regulatory program, and the State regulatory authority, after obtaining primacy, issues a notice of violation which is litigated before the State agency, the doctrines of res judicata and collateral estoppel will not preclude OSM from enforcing the cessation order and assessing penalties therefor, since the statutory scheme of the Surface Mining Control and Reclamation Act evidences a countervailing statutory policy against application of those doctrines in such a situation.

Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violation cited by OSM in its cessation order was not litigated before the State agency, and there was no privity between OSM and the State.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to backfill and grade previously mined lands to achieve the proper slope as required by 30 CFR 715.14(b) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that its operations had no adverse physical impact on those lands, the cessation order will be upheld when the evidence shows that the operations did, in fact, have an adverse physical impact on the lands.

Where, under 30 CFR 723.17(b), OSM fails to issue a notice of proposed penalty assessment within 30 days of issuance of a cessation order, but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987) 94 I.D. 181

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CESSATION ORDERS--Continued

Generally--Continued

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if the permittee failed to timely seek review of the notice of violation.

A cessation order is properly issued by OSMRE when the permittee fails to abate a notice of violation which calls for submitting, after construction, certification by a registered professional engineer that a sedimentation pond has been built in accordance with the approved design, even though the pond had been constructed.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

Where the permittee has failed to abate a violation within the time set for abatement in a notice of violation, the Office of Surface Mining Reclamation and Enforcement is obligated by sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), to issue a cessation order.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

CITIZEN COMPLAINTS

Generally

When the Office of Surface Mining Reclamation and Enforcement issues a 10-day notice to a state pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), based upon a citizen's complaint which alleges irregularities in the issuance of surface mining permits, and the state responds by demonstrating that the operator and the state complied with relevant provisions of the state's surface mining statute, the Board will affirm the decision of the Acting Director, Office of Surface

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

Mining Reclamation and Enforcement, that the response to the citizen's complaint was appropriate.

Samuel M. Mullinax, 96 IBLA 52 (Feb. 27, 1987)

A decision of the Office of Surface Mining Reclamation and Enforcement, declining to take enforcement action in response to a citizen's complaint stating that an operator has failed to comply with Federal and State requirements that the land be returned to approximate original contour, will be affirmed when the record establishes that the operator reclaimed the land in accordance with Federal and State regulations, which allow an exemption from the approximate original contour requirements when the land has been previously mined.

Dennis Zaccagnini, 96 IBLA 97 (Mar. 9, 1987)

Informal review in accordance with 30 CFR 842.15 of a decision not to inspect or take enforcement action in response to a citizen's request for a Federal inspection under 30 CFR 842.12 may be conducted by any neutral person who is not an immediate supervisor of the inspector whose actions are being reviewed.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

A decision by the Director, Office of Surface Mining Reclamation and Enforcement, or his delegate, in response to a citizen's complaint alleging that damage to a dwelling has been caused by blasting operations conducted by a surface coal mining operation, declining to take enforcement action pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271 (1982), is subject to appeal to the Board of Land Appeals. Where such a decision is based on a finding after inspection that the damage was not caused by blasting operations, the decision may be set aside and the case referred to an evidentiary hearing before an administrative law judge pursuant to 43 CFR 4.1286 where the issue of whether the blasting is a

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

causative factor in the damage is a material issue of fact dispositive of the appeal.

Clifford Mackey et al., 99 IBLA 285 (Oct. 23, 1987)

CIVIL PENALTIES

Generally

Where assessment of civil penalties comports with the procedures set out in 30 CFR Part 723, such assessment will not be disturbed on appeal absent a showing that it was arbitrarily, capriciously, or unfairly imposed.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

Where, in a decision, an Administrative Law Judge rules on the liability for a civil penalty even though liability was never an issue and the full amount of the civil penalty was prepaid prior to the hearing, any question of liability for the civil penalty was moot, and the Board will vacate the ruling.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987) 94 I.D. 181

When an Administrative Law Judge reduces the number of points assigned for a violation under 30 CFR 723.13(b) to fewer than 30, and that violation is not contained in a cessation order, the assessment of a civil penalty may be waived under 30 CFR 723.12(c). When the Administrative Law Judge declines to waive the penalty without providing a rationale, but the record demonstrates clearly that the permittee exercised diligence in attempting to prevent the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CIVIL PENALTIES--Continued

Generally--Continued

violation, and demonstrated good faith in abating the violation, a civil penalty of $240 is properly waived.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

Amount

Under 43 CFR 4.1157, when an Administrative Law Judge in a civil penalty hearing finds a violation has occurred, he is to determine the amount of the penalty. He is not bound by the proposed assessment, regardless of whether an assessment conference has previously been held.

A&S Coal Co. Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 338 (Apr. 7, 1987)

OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing thereon in violation of 30 CFR 715.20(e)(2). The permittee's diligent efforts to keep cattle from entering the area are factors to be considered in mitigation of the amount of a civil penalty assessed under 30 CFR Part 723.

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to seven points, based upon the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

CIVIL PENALTIES--Continued

Amount--Continued

extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

When an Administrative Law Judge reduces the number of points assigned for a violation under 30 CFR 723.13(b) to fewer than 30, and that violation is not contained in a cessation order, the assessment of a civil penalty may be waived under 30 CFR 723.12(c). When the Administrative Law Judge declines to waive the penalty without providing a rationale, but the record demonstrates clearly that the permittee exercised diligence in attempting to prevent the violation, and demonstrated good faith in abating the violation, a civil penalty of $240 is properly waived.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

Hearings Procedure

Under 43 CFR 4.1157, when an Administrative Law Judge in a civil penalty hearing finds a violation has occurred, he is to determine the amount of the penalty. He is not bound by the proposed assessment, regardless

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

CIVIL PENALTIES--Continued

Hearings Procedure--Continued

of whether an assessment conference has previously been held.

A&S Coal Co. Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 338 (Apr. 7, 1987)

Where, under 30 CFR 723.17(b), OSM fails to issue a notice of proposed penalty assessment within 30 days of issuance of a cessation order, but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987) 94 I.D. 181

Where OSMRE fails to issue a notice of proposed penalty assessment within 30 days of issuance of a notice of violation under 30 CFR 723.17(b), but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

Probability of Occurrence

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to seven points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

CIVIL PENALTIES--Continued

Probability of Occurrence--Continued

resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

Seriousness

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to seven points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

DISCOVERY

Generally

Where possible, in interpreting the Department's discovery rules under the Surface Mining Control and Reclamation Act of 1977, the body of case law which has evolved under the Federal Rules of Civil Procedure will be applicable.

An order by an Administrative Law Judge dismissing an application for review for failure to file answers to interrogatories, as directed, will be reversed on appeal where there is no evidence that the applicant's

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

DISCOVERY--Continued

Generally--Continued

failure to file those answers prior to issuance of the order was a substantial error prejudicing OSM's case.

Gary Yeaney d.b.a. Black Hawk Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 18 (Apr. 22, 1987)

ENFORCEMENT PROCEDURES

Generally

Where a 10-day notice to the State regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSM may issue a notice of violation in accordance with 30 CFR 843.12(a), if the State fails to take "appropriate action" to abate the violation. A notice of violation issued by OSM will be upheld where it appears that the notices of violation issued by the State in response to the 10-day notice were either vacated by the State, prior to abatement of the conditions giving rise to the violation, or the period for abatement was extended beyond the 90-day limitation imposed by State law.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 204 (Jan. 14, 1987)
94 I.D 12

If, upon reinspection after a State has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

Where a 10-day notice to the State regulatory authority is issued in response to a citizen's complaint, OSMRE may conduct a Federal inspection and issue appropriate enforcement orders if the State fails to take "appropriate action" to abate a violation within 10 days. Where, however, the evidence establishes that the State action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 87 (Sept. 15, 1987)

OSMRE may properly issue a notice of violation when, following a 10-day notice to the State regulatory authority, the State declines to correct a revegetation violation on the basis that it lacks jurisdiction to act following bond release.

Dora Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 300 (Dec. 23, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

ENVIRONMENTAL HARM

Generally

If, upon reinspection after a State has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

EVIDENCE

Generally

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to obtain prior approval for the construction of small depressions where there is no proof that the permittee, whether by design or otherwise, actually constructed the depressions.

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to pass all drainage through a sedimentation pond where there is no evidence that past drainage has left the permit area other than the OSMRE inspector's conjecture based on the contour of the land.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

FEDERAL PROGRAM

Generally

Pursuant to provision of 30 U.S.C. § 1276(a)(1) (1982) an attack upon the validity of the Secretary's regulations published pursuant to the Surface Mining Control and Reclamation Act of 1977 may be heard only in the United States District Court for the District of Columbia. An attack upon the validity of 30 CFR 843.12(a)(2) may not, as a consequence, be entertained by the Interior Board of Land Appeals.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

HEARINGS

Generally

In a hearing on an application for review of a notice of violation or cessation order, OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is unrebutted, the violation will be sustained on appeal.

Mullins Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 333 (Apr. 7, 1987)

In a civil penalty proceeding OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. If that showing goes unrebutted, it will sustain the violation.

A&S Coal Co. Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 338 (Apr. 7, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

HYDROLOGIC SYSTEM PROTECTION

Generally

A permittee will be deemed to have abated a violation of 30 CFR 715.17(a) for failure to pass all drainage from the disturbed area through a sedimentation pond before leaving the permit area where the notice of violation was modified by agreement of the parties at a hearing to require construction of a sedimentation ditch using straw bales and the evidence establishes that the permittee constructed a berm and filter barrier which was the functional equivalent of the agreed-upon structure.

Palmer Coking Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 266 (Mar. 26, 1987)

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to pass all drainage through a sedimentation pond where there is no evidence that past drainage has left the permit area other than the OSMRE inspector's conjecture based on the contour of the land.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

INITIAL REGULATORY PROGRAM

Generally

When OSM issues a notice of violation and a cessation order during the initial regulatory program, and the State regulatory authority, after obtaining primacy, issues a notice of violation which is litigated before the State agency, the doctrines of res judicata and collateral estoppel will not preclude OSM from enforcing the cessation order and assessing penalties therefor, since the statutory scheme of the Surface Mining Control and Reclamation Act evidences a countervailing statutory policy against application of those doctrines in such a situation.

Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violation cited by OSM in its cessation order was not litigated before the State

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INITIAL REGULATORY PROGRAM--Continued

Generally--Continued

agency, and there was no privity between OSM and the State.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to backfill and grade previously mined lands to achieve the proper slope as required by 30 CFR 715.14(b) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that its operations had no adverse physical impact on those lands, the cessation order will be upheld when the evidence shows that the operations did, in fact, have an adverse physical impact on the lands.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987) 94 I.D. 181

OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing thereon in violation of 30 CFR 715.20(e)(2). The permittee's diligent efforts to keep cattle from entering the area are factors to be considered in mitigation of the amount of a civil penalty assessed under 30 CFR Part 723.

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to seven points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INSPECTIONS

Generally

Pursuant to provision of 30 U.S.C. § 1276(a)(1) (1982) an attack upon the validity of the Secretary's regulations published pursuant to the Surface Mining Control and Reclamation Act of 1977 may be heard only in the United States District Court for the District of Columbia. An attack upon the validity of 30 CFR 843.12(a)(2) may not, as a consequence, be entertained by the Interior Board of Land Appeals.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

Informal review in accordance with 30 CFR 842.15 of a decision not to inspect or take enforcement action in response to a citizen's request for a Federal inspection under 30 CFR 842.12 may be conducted by any neutral person who is not an immediate supervisor of the inspector whose actions are being reviewed.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

The Secretary of the Interior through OSMRE has jurisdiction to issue a notice of violation in states with approved programs, where OSMRE, acting pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12(a)(2), issues a 10-day notice and the State fails to take appropriate action to ensure abatement of the violation or show good cause for its failure.

OSMRE may properly issue a notice of violation when, following a 10-day notice to the State regulatory authority, the State declines to correct a revegetation violation on the basis that it lacks jurisdiction to act following bond release.

Dora Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 300 (Dec. 23, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INSPECTIONS--Continued

10-day Notice to State

Where a 10-day notice to the State regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSM may issue a notice of violation in accordance with 30 CFR 843.12(a), if the State fails to take "appropriate action" to abate the violation. A notice of violation issued by OSM will be upheld where it appears that the notices of violation issued by the State in response to the 10-day notice were either vacated by the State, prior to abatement of the conditions giving rise to the violation, or the period for abatement was extended beyond the 90-day limitation imposed by State law.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 204 (Jan. 14, 1987)
94 I.D 12

If, upon reinspection after a State has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

Where a 10-day notice to the State regulatory authority is issued in response to a citizen's complaint, OSMRE may conduct a Federal inspection and issue appropriate enforcement orders if the State fails to take "appropriate action" to abate a violation within 10 days. Where, however, the evidence establishes that the State action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 87 (Sept. 15, 1987)

NOTICES OF VIOLATION

Generally

The Board will reverse an order of an administrative law judge dismissing an application for review of a notice of violation for failure to respond timely to a show cause order which concluded that the application had failed to allege facts entitling the applicant to administrative relief, in compliance with 43 CFR 4.1164, where the application was sufficient in that respect. The case will be remanded for further administrative proceedings.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 78 (Apr. 28, 1987)

When OSM issues a notice of violation and a cessation order during the initial regulatory program, and the State regulatory authority, after obtaining primacy, issues a notice of violation which is litigated before the State agency, the doctrines of res judicata and collateral estoppel will not preclude OSM from enforcing the cessation order and assessing penalties therefor, since the statutory scheme of the Surface Mining Control and Reclamation Act evidences a countervailing statutory policy against application of those doctrines in such a situation.

Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

be applicable when the violation cited by OSM in its cessation order was not litigated before the State agency, and there was no privity between OSM and the State.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to backfill and grade previously mined lands to achieve the proper slope as required by 30 CFR 715.14(b) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that its operations had no adverse physical impact on those lands, the cessation order will be upheld when the evidence shows that the operations did, in fact, have an adverse physical impact on the lands.

Where, under 30 CFR 723.17(b), OSM fails to issue a notice of proposed penalty assessment within 30 days of issuance of a cessation order, but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987) 94 I.D. 181

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if the permittee failed to timely seek review of the notice of violation.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing thereon in violation of

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

30 CFR 715.20(e)(2). The permittee's diligent efforts to keep cattle from entering the area are factors to be considered in mitigation of the amount of a civil penalty assessed under 30 CFR Part 723.

Where OSMRE fails to issue a notice of proposed penalty assessment within 30 days of issuance of a notice of violation under 30 CFR 723.17(b), but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

Where the permittee has failed to abate a violation within the time set for abatement in a notice of violation, the Office of Surface Mining Reclamation and Enforcement is obligated by sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), to issue a cessation order.

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

OSMRE has jurisdiction to issue a notice of violation of a State permanent regulatory program where OSMRE has assumed direct Federal enforcement of the State program pursuant to public notice duly published in the Federal Register.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

NOTICES OF VIOLATION--Continued

Remedial Actions

When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly issue a notice of violation requiring remedial action of a reclamation nature.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

A permittee will be deemed to have abated a violation of 30 CFR 715.14(i) for failure to regrade and stabilize rills and gullies on the permit area deeper than 9 inches where the notice of violation was modified by agreement of the parties at a hearing to require stabilization by placing straw bales at strategic locations and the evidence establishes that the permittee has stabilized the rills and gullies.

A permittee will be deemed to have abated a violation of 30 CFR 715.17(a) for failure to pass all drainage from the disturbed area through a sedimentation pond before leaving the permit area where the notice of violation was modified by agreement of the parties at a hearing to require construction of a sedimentation ditch using straw bales and the evidence establishes that the permittee constructed a berm and filter barrier which was the functional equivalent of the agreed-upon structure.

Palmer Coking Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 266 (Mar. 26, 1987)

PERFORMANCE BOND OR DEPOSIT

Generally

Where the record is unclear whether the surety of a performance bond was served by certified mail with OSMRE's notice of determination to forfeit the bond and the surety on appeal expresses its intention to reclaim the permit area, OSMRE should properly re-serve its

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERFORMANCE BOND OR DEPOSIT--Continued

Generally--Continued

notice of determination in accordance with 30 CFR 800.50.

American Resources Insurance Co., Inc., 99 IBLA 242 (Oct. 20, 1987)

PERMANENT REGULATORY PROGRAM

Generally

Informal review in accordance with 30 CFR 842.15 of a decision not to inspect or take enforcement action in response to a citizen's request for a Federal inspection under 30 CFR 842.12 may be conducted by any neutral person who is not an immediate supervisor of the inspector whose actions are being reviewed.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

PERMITS

Generally

Oklahoma Permanent Regulatory Program Regulations 779.25(j), which requires a surface mining operator to submit, in its permit application, cross-section maps and plans showing the location and depth, if available, of oil and gas wells within the proposed permit area, is not satisfied by the submission of an aerial photograph which does not designate or clearly show the existence of wells within the proposed permit area.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 349 (Nov. 3, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

PERMITS--Continued

Application

Where OSM has not acted in an arbitrary and capricious fashion, a decision under 30 CFR 764.15(a)(7) not to consider an unsuitability petition filed pursuant to sec. 522(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(c) (1982), to the extent it involves land which is subject to a Federal Coal Mining and Reclamation permit application which was filed, and the first newspaper notice thereof published, prior to the filing of the petition, will be affirmed.

Donald B. Peterson, 97 IBLA 314 (May 19, 1987)

PUBLIC HEALTH AND SAFETY

Imminent Danger

If, upon reinspection after a State has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

REVEGETATION

Generally

Failure to revegetate surface mining sites in conformity to state and Federal regulations was not shown by use of random sampling method, the origin and application of which were not explained, where miner's proof established there was a complete revegetation of surface mining sites in conformity to regulation in force.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing thereon in violation of 30 CFR 715.20(e)(2). The permittee's diligent efforts to keep cattle from entering the area are factors to be considered in mitigation of the amount of a civil penalty assessed under 30 CFR Part 723.

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to seven points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM

Generally

OSMRE has jurisdiction to issue a notice of violation of a State permanent regulatory program where OSMRE has assumed direct Federal enforcement of the State program pursuant to public notice duly published in the Federal Register.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982).

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 349 (Nov. 3, 1987)

The Secretary of the Interior through OSMRE has jurisdiction to issue a notice of violation in states with approved programs, where OSMRE, acting pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12(a)(2), issues a 10-day notice and the State fails to take appropriate action to ensure abatement of the violation or show good cause for its failure.

Dora Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 300 (Dec. 23, 1987)

10-day Notice to State

Pursuant to provision of 30 U.S.C. § 1276(a)(1) (1982) an attack upon the validity of the Secretary's regulations published pursuant to the Surface Mining Control and Reclamation Act of 1977 may be heard only in the United States District Court for the District of Columbia. An attack upon the validity of 30 CFR

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

843.12(a)(2) may not, as a consequence, be entertained by the Interior Board of Land Appeals.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

Where a 10-day notice to the State regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSM may issue a notice of violation in accordance with 30 CFR 843.12(a), if the State fails to take "appropriate action" to abate the violation. A notice of violation issued by OSM will be upheld where it appears that the notices of violation issued by the State in response to the 10-day notice were either vacated by the State, prior to abatement of the conditions giving rise to the violation, or the period for abatement was extended beyond the 90-day limitation imposed by State law.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 204 (Jan. 14, 1987)
94 I.D. 12

When the Office of Surface Mining Reclamation and Enforcement issues a 10-day notice to a state pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), based upon a citizen's complaint which alleges irregularities in the issuance of surface mining permits, and the state responds by demonstrating that the operator and the state complied with relevant provisions of the state's surface mining statute, the Board will affirm the decision of the Acting Director, Office of Surface Mining Reclamation and Enforcement, that the response to the citizen's complaint was appropriate.

Samuel M. Mullinax, 96 IBLA 52 (Feb. 27, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

Where a 10-day notice to the State regulatory authority is issued in response to a citizen's complaint, OSMRE may conduct a Federal inspection and issue appropriate enforcement orders if the State fails to take "appropriate action" to abate a violation within 10 days. Where, however, the evidence establishes that the State action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 87 (Sept. 15, 1987)

STATE REGULATION

Generally

When OSM issues a notice of violation and a cessation order during the initial regulatory program, and the State regulatory authority, after obtaining primacy, issues a notice of violation which is litigated before the State agency, the doctrines of res judicata and collateral estoppel will not preclude OSM from enforcing the cessation order and assessing penalties therefor, since the statutory scheme of the Surface Mining Control and Reclamation Act evidences a countervailing statutory policy against application of those doctrines in such a situation.

Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violation cited by OSM in its cessation order was not litigated before the State agency, and there was no privity between OSM and the State.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to backfill and grade previously mined lands to achieve the proper slope as required by 30 CFR 715.14(b) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that its operations had no adverse physical impact on those lands, the cessation order will be upheld when the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

STATE REGULATION--Continued

Generally--Continued

evidence shows that the operations did, in fact, have an adverse physical impact on the lands.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987) 94 I.D. 181

TOPSOIL

Redistribution

Where a fair interpretation of the terms of an approved permit leads to the conclusion that the operator agreed that approximately 24 inches of topsoil were present on the area which would be disturbed, an operator will not be heard to argue after the completion of mining, when it is no longer possible to ascertain with certainty how much topsoil had originally existed, that substantially less than 24 inches were found to exist during the course of its surface mining operations.

Office of Surface Mining Reclamation & Enforcement v. P & K Co., Ltd., 99 IBLA 257 (Oct. 20, 1987)

VARIANCES AND EXEMPTIONS

Generally

When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly issue a notice of violation requiring remedial action of a reclamation nature.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 --Continued

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS

Discharges from Disturbed Areas

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to pass all drainage through a sedimentation pond where there is no evidence that past drainage has left the permit area other than the OSMRE inspector's conjecture based on the contour of the land.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

Sedimentation Ponds

A cessation order is properly issued by OSMRE when the permittee fails to abate a notice of violation which calls for submitting, after construction, certification by a registered professional engineer that a sedimentation pond has been built in accordance with the approved design, even though the pond had been constructed.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to pass all drainage through a sedimentation pond where there is no evidence that past drainage has left the permit area other than the OSMRE inspector's conjecture based on the contour of the land.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

SURFACE RESOURCES ACT
(See also Hearings, Mining Claims--if included in this Index.)

GENERALLY

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone, sand and gravel, cinders, and certain other materials are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

SURVEYS OF PUBLIC LANDS
(See also Boundaries, Public Lands--if included in this Index.)

GENERALLY

Where, in computing the acreage of a parcel of land for purposes of arriving at its fair market value in a conveyance to a color-of-title applicant, BLM relied on planimetric measurements of the parcel as depicted on older survey plats and field notes and there is evidence the acreage may subsequently have changed through erosion or accretion, the Board will remand the case to BLM for a resurvey to determine the acreage actually existing in the tract on the date of appraisal.

Weathersby Godbold Carter, Richard T. Harriss, III, 97 IBLA 108 (Apr. 29, 1987)

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the

SURVEYS OF PUBLIC LANDS--Continued

GENERALLY--Continued

section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to the Board of Land Appeals.

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

AUTHORITY TO MAKE

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

SURVEYS OF PUBLIC LANDS--Continued

DEPENDENT RESURVEYS

A corner will be regarded as lost where the evidence fails to establish beyond a reasonable doubt that monuments or accessories are those set in the original survey, or that the corner has been perpetuated, or that collateral evidence with respect to courses and distances to known corners or intervening topographical and geographical items on line described in the field notes of the original survey identify the original position of the corner.

Stoddard Jacobsen & Robert C. Downer v. Bureau of Land Management, 97 IBLA 182 (May 8, 1987)

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Where one protests a 1966 dependent resurvey in 1984 on the basis that BLM improperly established a lost corner within a township by one-point control, BLM's decision denying that protest will be vacated where the person establishes by a preponderance of the evidence that BLM's determination to use one-point control constitutes gross error because there is not sufficient justification in the record for departing from the 1947 Survey Manual requirement to use two-point control.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Where the record presents unresolved questions of fact as to whether there are adequate reasons supporting BLM's departure from the usual method of apportioning accreted lands, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions.

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

TIMBER SALES AND DISPOSALS

A party seeking to establish that BLM has violated applicable policies regarding clear-cutting on Federal leases has the burden of showing error in BLM's actions. A mere disagreement or difference of opinion will not establish such error.

In Re Trailhead Timber Sale et al., 97 IBLA 8 (Apr. 20, 1987)

When the high bidder at a timber sale fails to tender the executed contract and the required performance bond, and has failed to make written request for an extension of the time for compliance within 30 days after receipt of the contract, under the governing regulation, the high bidder will forfeit the right to receive the contract and the bid deposit shall be retained as liquidated damages.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

A protest of a BLM declaration that a party is the successful high bidder at a timber sale is not a protest of a timber management decision governed by 43 CFR 5003.3, as the protesting party has no way of knowing who may bid at the sale or who will submit the high bid at the time a decision to conduct a sale is published. The regulations applicable to such protests are those found at 43 CFR 4.450-2.

Internat'l Paper Co., 98 IBLA 52 (June 5, 1987)

A BLM decision to proceed with a proposed timber sale will not be disturbed on appeal where the appellant has not established that BLM failed to consider relevant matters of environmental concern, such as the impact on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

In re Blackeye Again Timber Sale, 98 IBLA 108 (June 15, 1987)

TIMBER SALES AND DISPOSALS--Continued

In calculating the entitlement of a purchaser to a buy-out of BLM and Forest Service timber sale contracts under 43 CFR 5475.2-2(a), BLM may aggregate the total remaining volume of BLM contracts as of Jan. 1, 1982, as determined by BLM, and the total remaining volume of Forest Service contracts as of Jan. 1, 1982, as determined by the Forest Service in accordance with its regulations, in order to derive the total remaining volume of uncut timber under both types of contracts.

Freres Lumber Co., Inc., 100 IBLA 176 (Dec. 8, 1987)

TITLE

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

TRESPASS

GENERALLY

Removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

When a party has been found to be in trespass as a result of having removed sand and gravel from lands patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), the party must comply with the provisions of 43 CFR 9239.0-9(c) in order to qualify for purchase of additional sand and gravel from the Government. If the party does comply, BLM has the

TRESPASS--Continued

GENERALLY--Continued

discretion to sell additional sand and gravel to the trespasser pursuant to the provisions of sec. 1 of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1982), and its implementing regulations.

If, subsequent to giving notice that a party is in trespass when removing sand and gravel from lands in which the Government has retained all minerals, BLM agrees to allow the mining operations to continue while negotiating a settlement of the issue of trespass damages, the continued operations should not be considered as willful trespass unless and until the operator is given notice that the mining operations should cease.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

MEASURE OF DAMAGES

BLM may, consistent with State law, establish trespass damages for a nonwillful trespass resulting from the unauthorized removal of sand and gravel reserved to the United States in accordance with the royalty value of the material removed set forth in a private lease of that material, as long as the lease was an arm's-length transaction. However, the royalty value must represent only the value of the privilege of mining and removing the material and such use of the surface reasonably incident to mining or removal, as that is the interest reserved.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

The unauthorized removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass against the United States. The fact that the United States could not presently dispose of the deposit does not affect either the right of the United States to recover damages for the trespass nor the valuation of the deposit so removed.

The right of a surface owner of land patented under the Stock-Raising Homestead Act, as amended,

TRESPASS--Continued

MEASURE OF DAMAGES--Continued

43 U.S.C. § 291 (1970), for damages to the surface occasioned by the removal of minerals reserved under that Act is limited to the value of crops, permanent improvements, and damages to the land for grazing purposes.

In determining the amount of damages due to the United States for the unauthorized removal of reserved mineral deposits by the surface owner, it is necessary to first ascertain the in-place value of the mineral deposit and then subtract from this figure the amount of surface damages compensable under 43 U.S.C. § 299 (1970) and 30 U.S.C. § 54 (1982).

United States v. Browne-Tankersley Trust, 98 IBLA 325 (July 31, 1987)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970
(See also Appeals--if included in this Index.)

GENERALLY

A claim for compensation from the Park Service for entering upon the claimants' property for the purpose of processing their benefits claim is properly denied on the basis that the Act and the implementing regulations do not provide for such payment.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Thomas J. Randa, 7 OHA 66 (Apr. 22, 1987)

To the extent any information given by a Park Service representative may have suggested to claimants that they would be reimbursed for payment of fees for recordation of prior conveyance documents to perfect their record title to the lands conveyed to the United States, such advice was erroneous and cannot serve as a basis for creating any rights in claimants which are not authorized by law.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Peter W. Lind, 7 OHA 119 (Sept. 15, 1987)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

GENERALLY--Continued

To the extent any information given by a Park Service representative may have suggested to claimants that the representative promised they would be found eligible for a fixed payment under a loss of business claim if they applied for it, such information was erroneous and cannot serve as a basis for creating any rights in claimants which are not authorized by law.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Forrest L. Harmon, 7 OHA 151 (Oct. 29, 1987)

ADMINISTRATIVE REVIEW AND APPEALS

Where appellants withdraw their appeals to the extent of matters settled by agreement of the parties during the pendency of the appeals, the withdrawal will be accepted and the appeals will be dismissed, with prejudice, as to the settled matters.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Thomas J. Randa, 7 OHA 66 (Apr. 22, 1987)

UNIFORM REAL PROPERTY ACQUISITION POLICY

Generally

Departmental regulations implementing the Act provide for rental charges to a former tenant who is permitted to continue in short-term occupancy of the real propery after its acquisition by the United States, at a rate which is not more than the fair market value of the property to a short-term occupier.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Thomas J. Randa, 7 OHA 66 (Apr. 22, 1987)

UNIFORM REAL PROPERTY ACQUISITION POLICY--Continued

Expenses Incidental to Transfer of Title to the United States

Where the record shows prepayment penalty costs incurred by the grantor of the acquired property to the United States were both necessary and reasonable, they are reimbursable under § 303(2) of the Act and the Department's implementing regulations.

Uniform Relocation Assistance Appeal of Bonnie C. Cord, 7 OHA 99 (July 1, 1987)

Expenses incidental to transfer of title to the United States, reimbursable under § 303(1) of the Act and implementing regulations of the Department, do not include fees for recordation of prior conveyance documents to perfect the record title of the grantors of the lands to the United States.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Peter W. Lind, 7 OHA 119 (Sept. 15, 1987)

UNIFORM RELOCATION ASSISTANCE

Generally

A claim for a payment to cover possible Federal income tax costs with respect to benefits received for displacement from a business operation is properly denied on the basis that the Act and the Department's implementing regulation provide the benefits payments shall not be considered as income for purposes of the Internal Revenue Code.

A claim for a payment to cover professional costs which are incurred due to the election of the claimant for benefits to be represented by an attorney or accountant must be denied on the basis that the Act and the Deparment's implementing regulations do not provide for payment of such expenses.

Uniform Relocation Assistance Appeal of Tom Carolan, Individually & d.b.a. P. J. Systems, 7 OHA 47 (Mar. 18, 1987)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Generally--Continued

Benefits are not allowable under the Act and the Department's regulations to compensate displaced persons for the mortgage balance remaining due from them on acquired property.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Brad Chapman, 7 OHA 112 (Aug. 19, 1987)

Moving and Related Expenses

Generally

Expenses claimed for reinstallation of personal property, for making necessary modifications, and for reconnection of certain utilities in the replacement dwelling are not reimbursable as moving and related expenses where they are shown to represent costs for improvements and for additions to the replacement dwelling rather than costs for reestablishment and reconnection of such facilities as personal property owned by the claimant and moved from the acquired dwelling to the replacement dwelling.

Uniform Relocation Assistance Appeal of Tom Carolan, Individually & d.b.a. P. J. Systems, 7 OHA 47 (Mar. 18, 1987)

Where appellants fail to establish entitlement to reimbursement for actual moving and related expenses in an amount greater than that allowed in the decision appealed from, the decision will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Glen M. Zizka, 7 OHA 58 (Apr. 13, 1987)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving and Related Expenses--Continued

Generally--Continued

Leasing commissions for negotiating and consummating a lease of office space to which the displaced business was relocated, paid by the landlord of the replacement business site to separate brokers representing the landlord and the owners of the relocated business, respectively, are not compensable as moving and related expenses under the Act and the Department's implementing regulations. Such expenses, being related to the business use of property to which the business was relocated, are properly borne by the owners of that property as business-related expenses.

Uniform Relocation Assistance Appeal of Charles Pankow Builders, Inc., 7 OHA 70 (Apr. 28, 1987)

Costs for call-forwarding telephone service are additional operating expenses of a business incurred because of operating in a new location and as such they are not compensable under regulations of the Department implementing the Act.

Uniform Relocation Assistance Appeal of Carroll/Cahill Associates, 7 OHA 73 (May 5, 1987)

A non-profit organization may be reimbursed for actual and reasonable costs of providing notice to its clientele of the location of its replacement business site.

Uniform Relocation Assistance Appeal of Northern California Broadcasting Ass'n, 7 OHA 75 (May 7, 1987)

Leasing brokerage commissions paid by the lessor of replacement business offices are not reimbursable as moving and related expenses of the relocated business.

Uniform Relocation Assistance Appeal of Economics Research Associates, 7 OHA 102 (July 20, 1987)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving and Related Expenses--Continued

Generally--Continued

Costs for call-forwarding telephone connection services are additional operating expenses of a business incurred because of operating in a new location and as such they are ineligible for reimbursement as moving and related expenses under regulations of the Department implementing the Act.

Reasonable and necessary costs of replacing stationery on hand at the time of displacement that are made obsolete as a result of the move are reimbursable as moving and related expenses under regulations of the Department implementing the Act.

Costs of moving any structure or other real property improvement in which the displaced person reserved ownership are not reimbursable under the Act and the Department's implementing regulations.

Uniform Relocation Assistance Appeal of Silk & Marois (a law corporation), 7 OHA 104 (Aug. 3, 1987)

Where appellant fails to establish entitlement to reimbursement for actual reasonable moving costs and related expenses in an amount greater than that allowed in the decision appealed from, the decision will be affirmed.

Uniform Relocation Assistance Appeal of See & Sea Travel, Inc., 7 OHA 109 (Aug. 6, 1987)

Payments in Lieu of Moving and Related Expenses

Fixed Payment(s)

Generally

Where claimants elect to receive a moving expense allowance and a dislocation allowance under § 202(b) of the Act in lieu of a payment for actual moving and

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving and Related Expenses--Continued

Payments in Lieu of Moving and Related Expenses --Continued

Fixed Payment(s)--Continued

Generally--Continued

related expenses under § 202(a) of the Act for reimbursement of certain actual moving and related expenses, these expenses are properly disallowed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Brad Chapman, 7 OHA 112 (Aug. 19, 1987)

Taking of Business Operation

A loss of business payment under § 202(c) of the Act, authorized to be made to qualified persons displaced from their business operation, is a payment in lieu of benefits allowable for moving and related expenses of the business under § 202(a) of the Act.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Glen M. Zizka, 7 OHA 58 (Apr. 13, 1987)

Where the evidence shows displaced persons were reimbursed for actual reasonable moving and related expenses under § 202(a) of the Act with respect to all personal property removed from their dwelling on the acquired lands, in which dwelling the displacees had also conducted their financing business operation, they are not eligible for a fixed payment under § 202(c) of the Act upon a loss of business claim.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Forrest L. Harmon, 7 OHA 151 (Oct. 29, 1987)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Homeowners

Generally

Costs for a property-line survey are not allowable as reasonable expenses incurred by displaced persons incident to the acquisition of the replacement residential property where the displaced persons have already received the maximum allowable replacement housing payment benefits under the Act and the implementing regulations.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Thomas J. Randa, 7 OHA 66 (Apr. 22, 1987)

Where the record shows appellants were eligible under § 203 of the Act for replacement housing differential costs for $3,000 and they received payments totalling $2,417.50 in such benefits, the additional payment to which they are entitled is $582.50.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Brad Chapman, 7 OHA 112 (Aug. 19, 1987)

Replacement Housing Payment for Tenants and Certain Others

The allowable replacement housing payment to a displaced tenant who purchases a replacement dwelling is that amount which is necessary to enable him to make a downpayment, including allowable incidental expenses described in § 203(a)(1)(C) of the Act, on the purchase of a decent, safe, and sanitary replacement dwelling, but not in excess of $4,000, as provided in § 204(2) of the Act.

Uniform Relocation Assistance Appeal of Tom Carolan, Individually & d.b.a. P. J. Systems, 7 OHA 47 (Mar. 18, 1987)

WATER AND WATER RIGHTS

GENERALLY

When considering applications for rights-of-way privileges the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

STATE LAWS

When considering applications for rights-of-way privileges the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

WILD AND SCENIC RIVERS ACT

BLM may properly cause the holder of a special recreation permit for commercial use of a wild and scenic river to forfeit two scheduled trips where the evidence establishes that, in the preceding year's regulated use period, the permittee launched a scheduled trip without checking in at the necessary location on the day of the launch, as required by stipulations incorporated in the permit.

BLM may properly place the holder of a special recreation permit for commercial use of a wild and scenic river on a probationary status where the evidence establishes that the permittee gave his trip card to someone other than a bona fide employee, who then conducted the scheduled trip, thereby effecting a partial assignment of his permit in violation of the stipulations incorporated in his permit.

Robert L. Snook d.b.a. Beaver State Adventures, 100 IBLA 151 (Dec. 3, 1987)

WILDERNESS ACT

BLM may properly reject a proposed modification of an approved plan of operations, seeking to engage in open pit mining within a wilderness study area, where the record establishes that the proposed operation would impair the naturalness of the study area. In addition, BLM may properly require the mining claimant to undertake reclamation of any area affected by unauthorized mining operations.

L. C. Artman et al., 98 IBLA 164 (June 24, 1987)

Lands designated by Congress as a component of the National Wilderness Preservation System are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984. A Bureau of Land Management decision rejecting geothermal lease offers for lands within a designated wilderness area will be affirmed in the absence of a showing of valid existing rights.

Eugene Water & Electric Board, 98 IBLA 272 (July 10, 1987)

WILDLIFE REFUGES AND PROJECTS
(See also Exchanges of Land, Migratory Bird Conservation Act--if included in this Index.)

GENERALLY

No formal withdrawal is necessary to "withdraw and convey" lands out of the National Wildlife Refuge System pursuant to sec. 14(h)(7) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(7) (1982), because the primary purpose of a withdrawal under the Act is to protect the Native claimant from creation of an intervening interest in the property. No such protection is necessary as the lands have previously been withdrawn for wildlife refuge purposes.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

WITHDRAWALS AND RESERVATIONS

GENERALLY

No formal withdrawal is necessary to "withdraw and convey" lands out of the National Wildlife Refuge System pursuant to sec. 14(h)(7) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(7) (1982), because the primary purpose of a withdrawal under the Act is to protect the Native claimant from creation of an intervening interest in the property. No such protection is necessary as the lands have previously been withdrawn for wildlife refuge purposes.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

Mining claims located on lands withdrawn for reclamation purposes under the first form are null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Frank David Hill, 99 IBLA 16 (Aug. 14, 1987)

A withdrawal of land made under the authority of the Pickett Act remains in effect until revoked.

The standard for distinguishing under the Pickett Act whether a mineral deposit is metalliferous or nonmetalliferous is that if the deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal, which is extracted and used in the trades as such, the deposit is metalliferous. If the minerals contained in the deposit contain metals but are extracted and used mainly in the form of compounds with other elements, the deposit is nonmetalliferous.

David E. Hoover & Lester F. Whalley, 99 IBLA 291 (Oct. 26, 1987)

WITHDRAWALS AND RESERVATIONS--Continued

GENERALLY--Continued

Publication of the notice of a withdrawal application in the Federal Register segregates the lands described in the application from settlement, sale, location, or entry under the general land laws, including the mining laws, to the extent specified in the notice.

A lode claim located on land segregated and closed to mineral entry by publication of notice of an application for withdrawal of the land in the Federal Register is properly declared null and void ab initio.

Coeur Explorations, Inc., 100 IBLA 293 (Dec. 22, 1987)

EFFECT OF

An application to make homestead entry on land subject to a properly filed State selection application under the Alaska Statehood Act is properly rejected.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

In the absence of favorable action upon a petition to designate the land as suitable for desert land entry, an application for a desert land entry will not be considered a valid existing right excepted from a subsequent withdrawal order, and the application must be rejected by BLM, regardless of any challenge to the propriety and efficacy of the subsequent withdrawal.

Richard S. Gregory, 96 IBLA 256 (Mar. 25, 1987)

BLM may properly reject a desert land entry application where, prior to classification of the lands sought and prior to the entry being allowed, the lands have been withdrawn by a public land order as part of the Snake River Birds of Prey Area.

Diane M. Jensen, Odell M. Smith, Jr., 97 IBLA 23 (Apr. 23, 1987)

Byron V. Anderson, 97 IBLA 105 (Apr. 29, 1987)

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

While failure to record a mining claim as required by State law does not, in and of itself, render the claim invalid, other events, such as a withdrawal or classification of the land by the United States, prior to any corrective action by the claimant, may operate as an adverse right which will make the claim invalid.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

An application for a desert land entry is properly rejected where the lands at issue were previously classified as suitable for desert land entry but no entry was allowed under the application prior to withdrawal of the lands from entry under the Desert Land Act.

Gerald W. Marlin et al., 98 IBLA 128 (June 19, 1987)

A notice of location of a headquarters site is properly rejected where at the time of filing the land involved is not unreserved public land because it had been withdrawn from all forms of appropriation under the public land laws by Public Land Order No. 5418 for classification and protection of the public interest.

Mark L. Whitman, 98 IBLA 391 (Aug. 5, 1987)

BLM properly declares a mining claim null and void ab initio and rejects a mineral patent application therefor when the evidence establishes the claim was located prior to revocation of a first-form reclamation withdrawal.

Lynn H. Grooms et al., 99 IBLA 237 (Oct. 19, 1987)

Publication of the notice of a withdrawal application in the Federal Register segregates the lands described in the application from settlement, sale, location, or entry under the general land laws,

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

including the mining laws, to the extent specified in the notice.

A lode claim located on land segregated and closed to mineral entry by publication of notice of an application for withdrawal of the land in the Federal Register is properly declared null and void ab initio.

Coeur Explorations, Inc., 100 IBLA 293 (Dec. 22, 1987)

RECLAMATION WITHDRAWALS

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

Kenneth Carter, 98 IBLA 100 (June 12, 1987)

WITHDRAWALS AND RESERVATIONS--Continued

RECLAMATION WITHDRAWALS--Continued

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982).

Thomas L. Lee, 98 IBLA 149 (June 22, 1987)

Mining claims located on lands withdrawn for reclamation purposes under the first form are null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Frank David Hill, 99 IBLA 16 (Aug. 14, 1987)

REVOCATION AND RESTORATION

Land withdrawn as a military reservation and subsequently returned by Executive order to the jurisdiction of the Department of the Interior for disposition under the authority of the Act of July 5, 1884, ch. 214, 23 Stat. 103, is not thereby restored to the operation of the public land laws generally. Such land is not vacant, unappropriated, and unreserved, and, hence, a Native allotment application filed for such land alleging use and occupancy commencing after the date of the withdrawal is properly rejected.

Harold Ahmasuk et al., 96 IBLA 42 (Feb. 27, 1987)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness

to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

Kenneth Carter, 98 IBLA 100 (June 12, 1987)

Lands withdrawn from entry under some or all of the public land laws remain withdrawn until there is a formal revocation or modification of the order of withdrawal. Where a public land order withdrawing lands from location of mining claims for metalliferous minerals is expressly amended by a subsequent public land order deleting certain lands from the withdrawal, a decision declaring mining claims located thereafter for precious metals on lands deleted from the withdrawal to be null and void ab initio will be reversed.

Harry J. Ayala, 99 IBLA 19 (Aug. 17, 1987)

BLM properly declares a mining claim null and void ab initio and rejects a mineral patent application therefor when the evidence establishes the claim was located prior to revocation of a first-form reclamation withdrawal.

Lynn H. Grooms et al., 99 IBLA 237 (Oct. 19, 1987)

WITHDRAWALS AND RESERVATIONS--Continued

STATE SELECTIONS

An application to make homestead entry on land subject to a properly filed State selection application under the Alaska Statehood Act is properly rejected.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

TEMPORARY WITHDRAWALS

A withdrawal of land made under the authority of the Pickett Act remains in effect until revoked.

David E. Hoover & Lester F. Whalley, 99 IBLA 291 (Oct. 26, 1987)

WORDS AND PHRASES

"Notation rule." Where an Alaska Native corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face in that the land selected is not legally subject to such selection under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

"Potentially exclusive of others." As used in 43 CFR 2561.0-5, the phrase "potentially exclusive of others" means that the nature of the use must be such that any person on the land, under normal circumstances, knew or should have known that the land was subject to the claim of another. Under this standard, use of land solely for picking berries, without more, cannot be

WORDS AND PHRASES--Continued

deemed potentially exclusive of others and, therefore, cannot establish a right to a Native allotment.

Angeline Galbraith, 97 IBLA 132 (May 6, 1987)
94 I.D. 151

"Date of location." The "date of location" of a mining claim is "the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel side is situated." 43 CFR 3833.0-5(h). Absent clear evidence to the contrary in a specific case, under Alaska State law the date of location of a mining claim is the date notice is posted on the claim as recited in the recorded certificate of location.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

"Dwelling." Under 43 CFR 2653.8-2(b)(1) a "dwelling" is a house or other structure in which a person or persons live, reside, or habitate. A structure useable only as an emergency shelter is not a dwelling for purposes of this regulation.

United Forest Service, 98 IBLA 157 (June 24, 1987)

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under Utah law, the date of location is that date specified in the notice of location posted on the mining claim and in the copy of the notice of location filed with the county recorder's office.

Kerry Shumway, 99 IBLA 156 (Sept. 25, 1987)

"Good faith." Good faith in the location of mining claims is widely recognized as an implicit requirement of the mining laws. When a question of good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims, the issue is appropriately left to resolution by judicial proceedings between the locators. However, "good faith" may also concern a locator's knowledge and

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purposes in attempting to obtain rights to Federal lands by establishing mining claims.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429